103

SUPREME COURT OF THE UNITED STATES

No. 98.

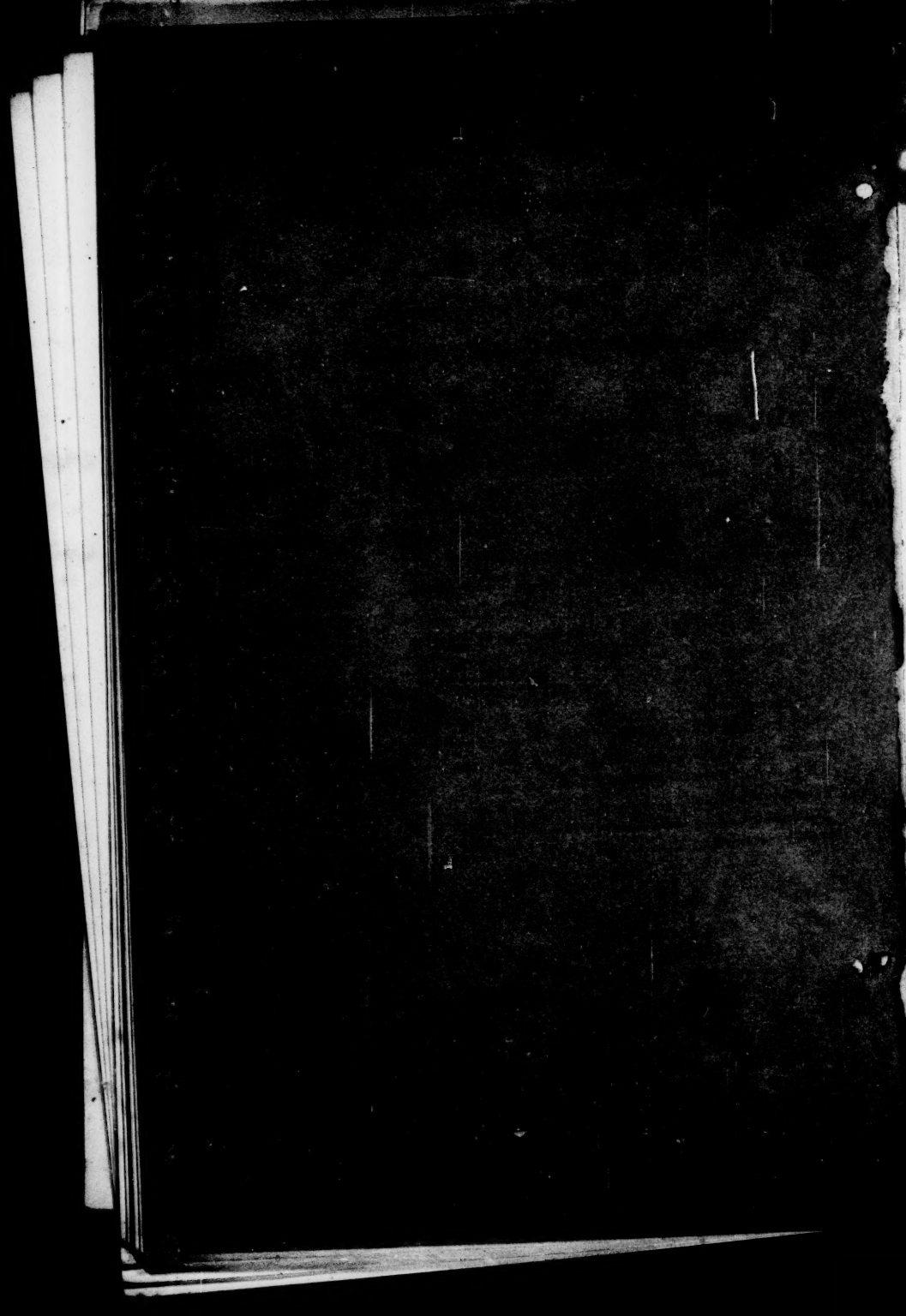
THE CALAIS STEAMBOAT COMPANY, APP'TS,

vs.

CHARLES SCUDDER, ADMINISTRATOR OF JOHN VAN PELT, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

GOVERNMENT PRINTING OFFICE.



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Return to certiorari.

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3 SUPREME COURT, *County of New York:*

MARSHAL A. MATHIS, collector of all and singular the goods, chattels, and personal estate of JOHN VAN PELT, deceased,

v.

WILLIAM W. VANDERBILT.

First. The plaintiff in this action, by J. T. Williams, his attorney, complains of the defendant—

That the said plaintiff was, by letters of administration duly issued by the surrogate of the city and county of New York, under his hand and seal of office, bearing date the fifteenth day of September, 1854, duly appointed collector of all and singular the goods, chattels, credits, and personal estate of John Van Pelt, deceased, with all and singular the powers by the statute in such cases given and prescribed. That heretofore, to wit, at divers and sundry times during the lifetime of the said John Van Pelt, and between the first day of March, 1853, and the first day of March in the year 1854, at San Francisco, in the State of California, the said defendant received of and from the said John Van Pelt divers and sundry sums of money, amounting in all to the sum of forty thousand dollars, under and by virtue of an agreement that the same, and each and every part thereof, should be without delay applied and appropriated by the said defendant to, upon, and towards the building, furnishing, rigging, and completing a certain steamboat then in process of building at the city of
4 New York, by and for the said Van Pelt. That the said defendant, although often requested, refused, and has ever since refused, and still refuses, so to apply or appropriate said money; but, on the contrary thereof, the said defendant did, at the time and place aforesaid, convert the said money, and each and every part thereof, to his own use. And the plaintiff says that the said defendant, in consideration of the premises, afterwards, to wit, at the city of New York, on the fifteenth day of September, 1854, promised and agreed to pay to the said plaintiff, as such collector aforesaid, the said sum, with interest thereon from the time of the receipt thereof aforesaid, when he should thereafter be requested so to do; and the plaintiff says that the defendant, although often requested, has ever since refused and still refuses so to pay said sum, or any part thereof.

Second. And for a second cause of action, the plaintiff says, that at divers and sundry times between the first day of March, 1853, and the first day of March, in the year 1854, at the city of New York, the said defendant received of and from divers and sundry persons, the heirs of one John Van Pelt, then deceased, divers sums of money, amounting in all to the sum of forty thousand dollars, money which belonged to the said John Van Pelt in his lifetime, and was left in the hands of the persons aforesaid at the time of his death, under and pursuant to an agreement before that time and during the lifetime of the said John Van Pelt, to wit, on the first day of August, in the year 1853, that the said defendant should receive of and from the said

Van Pelt the said sum, and should without delay apply and appropriate the same in and about the building, furnishing, rigging,
5 and completing a certain steamboat in the said city of New York, there in process of building by and for the said Van Pelt. And the plaintiff says that the said defendant, although often requested, wholly neglected and refused to apply or appropriate the said money to the said building, fitting, rigging, or furnishing of the said steamboat; but, on the contrary thereof, did afterwards, and on the day and at the place aforesaid, convert the said money to his own use.

And the plaintiff further says, that the said defendant, in consideration of the premises, undertook and agreed, on the said fifteenth day of September, 1854, at the city of New York, and in consideration that the said plaintiff had on that day been duly appointed, by letters of administration duly issued by and under the seal of office of the surrogate of the city and county of New York, collector of all and singular the goods, chattels, credits, and personal property of the said John Van Pelt, to pay the said sum, with interest thereon from the time of the receipt thereof, and of each and every part thereof, to the said plaintiff, as such collector as aforesaid, whenever he should be thereto requested; and although often requested, the said defendant has not yet paid said sum of money, or any part thereof.

Third. And for a third cause of action, the plaintiff says, that heretofore, to wit, on the ninth day of September, at the city of New York, the said defendant had in his possession a certain steamboat called the "Adelaide," with her tackle, apparel, boats, and furniture, which belonged to and was the property of one John Van Pelt, deceased, and of which the said Van Pelt died the owner; that on the day and at the place aforesaid the said defendant converted the said steamboat, her tackle, apparel, boats, and furniture, to
6 his own use; that by letters of administration duly issued by the surrogate of the city and county of New York, under his hand and official seal, bearing date the fifteenth day of September, 1854, the said plaintiff was duly appointed collector of all and singular the goods, chattels, credits, and personal property of the said John Van Pelt, deceased, with all the power and authority by the statute in such case given and prescribed; that on the day and at the place aforesaid the said defendant, in consideration of the premises, undertook and promised to pay the said plaintiff the sum of forty thousand dollars, the worth and value of the said steamboat, her tackle, apparel, boats, and furniture, when he should be thereto requested; and the plaintiff says that although often requested, the said defendant has not yet paid the said sum of forty thousand dollars, or any part thereof.

Wherefore he demands judgment against the said defendant for the sum of forty thousand dollars, with interest thereon from the first day of September, 1854, beside the costs of this action.

J. T. WILLIAMS,
Pl'ff Att'y.

Endorsements: N. Y. supreme court. Marshal A. Mathis, collector, &c., *vs.* William W. Vanderbilt. Copy complaint.
J. T. WILLIAMS, *Plff's Att'y.*

7 SUPREME COURT, *County of New York:*

William W. Vanderbilt at the suit of Marshal A. Mathis, collector of all and singular the goods, chattels, and personal estate of John Van Pelt, deceased.

The defendant, William W. Vanderbilt, appears by Shephard & Parsons, his attorneys in this action, and answering the plaintiff's complaint, says: First, that he has no knowledge or information thereof sufficient to form a belief that the plaintiff has been appointed collector of all and singular the goods, chattels, personal estate, and credits which were of John Van Pelt, deceased, as alleged in his complaint; and the defendant denies that he ever received the sum of forty thousand dollars, or any other sum, from the said John Van Pelt, under or by virtue of any agreement; but the defendant admits that he did, between the fifteenth day of May, in the year 1853, and the second day of August of the same year, receive, from the said John Van Pelt, the sum of twenty thousand dollars, in pursuance of a certain agreement hereinafter set forth.

And the defendant further denies that he ever refused, or still does refuse, to apply any money received from the said John Van Pelt to the purpose for which it was received, or that he has ever converted to his own use any money received from the said John Van Pelt.

8 And the defendant further denies that he has ever received any sum of money from the heirs of the said John Van Pelt, under or pursuant to any agreement, or that the defendant has neglected or refused to apply or appropriate any money received from any person or persons, the heirs of John Van Pelt, to any purpose for which it was so received, or that the defendant has ever converted any such money to his own use.

And the defendant further denies that he ever had in his possession any steamboat, or other vessel, or her tackle, apparel, boats, or furniture, which belonged to or was the property of John Van Pelt, or of which he was owner when he died, or that he ever converted any such vessel to his own use; but he admits that he did, from the first day of May, 1854, until on or about the third day of August, in the year 1854, have in his possession a certain steamboat, called the Adelaide in the complaint mentioned, her boats, apparel, tackle, and furniture, as hereinafter particularly stated.

And the defendant further denies that he ever promised, undertook, or agreed to pay any sum of money whatever to the plaintiff as administrator or collector as aforesaid, or otherwise, or that the plaintiff, as such, ever requested of the defendant the payment of any sum whatever, or that he has ever refused to make such payment to the plaintiff as such administrator or collector as aforesaid.

And the defendant, for further answer to the complaint, says, that on or about the month of April, in the year 1853, he, the said de-

fendant, and the said John Van Pelt, at the city of San Francisco, in the State of California, made and entered into a certain verbal agreement, wherein and whereby they did mutually agree that this
9 defendant should come on to the city of New York, and should there contract for and in his own name, and personally attend to direct and supervise the building, equipping, and furnishing a certain steamship, to be called the Adelaide, the general plan and specification and — (?) of which were then and there determined upon by and between the said John Van Pelt and this defendant, and of which, until wholly and entirely built, equipped, and finished, this defendant was to be the owner, and to have the whole charge and management, and the plan, arrangement, and detail of which were to be wholly in the discretion of this defendant, to be varied, altered, or adhered to, as he might choose and determine. That by the terms of the said agreement between this defendant and the said John Van Pelt, this defendant was to contribute towards the building of the steamship aforesaid the sum of four thousand dollars and his personal work, labor, and services in and about the building, furnishing, and equipping of the said vessel, and the said John Van Pelt was to apply all such other sum or sums of money as might be necessary wholly to build, complete, and finish the said steamship, her tackle, apparel, boats, and furniture, and in consideration thereof this defendant was to own her equal undivided twentieth part thereof.

That this defendant did, accordingly, on or about the fifteenth day of May, 1853, pay and advance unto the said John Van Pelt the said sum of four thousand dollars, in promissory notes then maturing and unpaid, and in bonds of the city of Benicia, which were then received by the said John Van Pelt in full payment of the said sum of four thousand dollars.

10 That it was further understood and agreed by and between this defendant and the said John Van Pelt, that this defendant should contract for the building of the said vessel upon his own responsibility and in his own name, and that this defendant should take the bill of sale of the said vessel, and that she should be registered at the custom-house of the city of New York in the name and as the vessel of this defendant, and that the same should be and remain the vessel of this defendant until her arrival in the waters of California, her place of destination, at which time she should be transferred to those persons who might then become her owners.

That the defendant did accordingly come on from said California to the city of New York, and did here enter into contracts for building, furnishing, and equipping the said steamship in his own name and upon his own responsibility, and did proceed to have the said vessel built, equipped, and furnished under his personal charge, care, and supervision; and the said vessel was fully and entirely built, furnished, finished, and equipped under the personal care and supervision of this defendant.

That on or about the 22d day of May, A. D. 1854, Lupton &

McDiarmid executed a certificate of the said vessel to this defendant, a copy whereof is hereunto annexed, marked Schedule A.

That the defendant did, on or about the sixteenth day of May, 1853, receive from the said John Van Pelt the sum of twelve thousand dollars, and on or about the first day of August, in the year 1853, the further sum of eight thousand dollars, all of which, with the exception of the sum of two hundred and ninety-seven
11 dollars and sixty-four cents, which the said John Van Pelt directed to be applied and appropriated to another purpose, and which was so appropriated and applied to and upon the steamship.

That some time after the arrival of this defendant in the city of New York, and on or about the first day of September, in the year 1853, as this defendant is informed and believes, the said John Van Pelt sold and disposed of his interest in the said steamship, as follows: his interest in ten twentieths of the said vessel to one David P. Vail; in four twentieths thereof to one Richard Chenery; in three twentieths thereof to one Richard M. Jessup; and in one twentieth thereof to one Frank Johnson.

That, as this defendant is informed and believes, on or about the twenty-ninth day of September, in the year eighteen hundred and fifty-three, and at the State of California, the said John Van Pelt died intestate, never having paid or advanced to this defendant for the said vessel any other or greater sum of money than as aforesaid; and, as defendant is also informed and believes, the said Richard Chenery, with the said Frank Johnson and one James , were, on or about the month of October, in the year 1853, duly appointed administrators of all and singular the goods, chattels, and credits, which were of the said John Van Pelt under and by virtue of the laws of the State of California, and have duly qualified and entered upon the execution of their trusts as such administrators as aforesaid.

That the defendant has received from the said Richard Chenery and from the said David P. Vail, and expended upon the said vessel, a sum of money, together with a sum of money expended
12 thereupon by the said David P. Vail, under the direction of this defendant, sufficient to wholly finish, furnish, and equip the said vessel, and with which she was wholly finished, furnished, and equipped.

That the sum so received by this defendant from the said Richard Chenery, and expended in and upon the said steamship, amounted to the sum of ten thousand dollars; and the sum so received from the said David P. Vail, and expended in and upon said vessel, amounted to the sum of forty-eight thousand dollars.

That on or about the third day of August, in the year 1854, duly empowered by and under and in pursuance of the direction of the said Richard Chenery, acting for himself individually, and also acting for himself and the said Johnson and James , as administrators as aforesaid, and also empowered by and under the direction of the said David P. Vail, Richard M. Jessup, and Frank Johnson, this defendant sold and duly transferred and delivered the said steamship

Adelaide, her tackle, apparel, boats, and furniture, for a good and sufficient consideration, to one William Deming.

This defendant further says, that he has never received, for or on account of the said vessel, from the said John Van Pelt, or from any other person or persons, as his heirs-at-law or as representatives of the said John Van Pelt, any other or greater sum than the said two sums of twelve thousand dollars and eight thousand dollars, respectively; that all the other moneys expended upon the said vessel were received from the said Richard Chenery, or from the said David P. Vail, as aforesaid; and that neither the said Richard Chenery
13 nor the said David P. Vail ever represented to defendant that such moneys came from or were part of the estate of the said John Van Pelt; and that up to and after the date of the sale of the said steamship to the said Deming, as aforesaid, no letters of administration on the estate of John Van Pelt had been granted to any person or persons in any county in the State of New York, to the knowledge, information, or belief of this defendant.

This defendant further says, that he has fully and fairly accounted to and with the said Richard Chenery, for himself individually, and for himself and the other administrators of the estate of the said John Van Pelt, as aforesaid, and to and with the said David P. Vail, Richard M. Jessup, and Frank Johnson, the persons interested in the said steamship Adelaide, for the proceeds of the sale thereof, and paid over the same, and has received from them a full acquittance and discharge.

And this defendant further saith, that at the time of the alleged granting letters of collection or administration to the plaintiff, (if any such have been granted,) he had no property as assets of the estate of the said John Van Pelt in his possession or under his control.

Second. As and for a second defence to this action, this defendant further says, that, as he is informed and believes, heretofore and since the fifteenth day of September, in the year 1854, one Eleanor Van Pelt, as defendant is informed and believes, the mother of the said John Van Pelt, and the mother-in-law of the said plaintiff, residing in or near the city of New York, claiming to have been appointed administratrix of the estate of the said John Van Pelt, by and under the laws of the State of Massachusetts, with the consent and concurrence and at the investigation of the plaintiff, has filed her
14 certain libel in the district court of the United States for the district of Massachusetts (in which said district the said vessel has been since the sale to said Deming) against the said steamship Adelaide, her tackle, apparel, boats, and furniture, claiming, as administratrix as aforesaid, to be the owner of the said vessel, and that the sale thereof by this defendant was fraudulent and void, and demanding the possession and delivery of the said vessel to her, the said libellant; and this defendant claims and insists that the relief demanded in this action is inconsistent with the prayer of the said libel.

Wherefore this defendant demands that the said complaint be dismissed with costs.

SHEPARD & PARSONS, *Deft's Att'ys.*

CITY AND COUNTY OF NEW YORK, *ss*:

William W. Vanderbilt, of said city, the defendant in this action, being duly sworn, says, that the foregoing answer is true of his own knowledge, except as to those matters which are therein stated on information and belief; and as to those matters he believes it to be true.

W. W. VANDERBILT.

Sworn to before me this 29th day of November, A. D. 1854.
WM. DIXY, *Com'r of Deeds.*

SCHEDULE A.

We, Lupton & McDiarmid, of Greenpoint, State of New York, do hereby certify, that the steamer or vessel called the Adelaide was built by us, or under our direction, at Greenpoint aforesaid, in the year eighteen hundred and fifty-four; that she is of the
15 following dimensions, to wit: her length of keel is two hundred and thirty-five feet, her breadth of beam is thirty-three feet, her depth of hold is nine feet ten inches, and measures seven hundred and ninety-two $\frac{55}{95}$ tons, or thereabouts; and that she is owned by William W. Vanderbilt.

In testimony whereof, we have hereunto subscribed our names this twenty-second day of May, 1854.

(Signed) LUPTON & McDIARMID.

CUSTOM-HOUSE, NEW YORK,
Collector's Office, November 29, 1854.

I hereby certify the above to be a true copy of an original certificate now on file in this office.

In testimony whereof, I have hereunto set my hand and seal the day and year above written.

[SEAL.] (Signed) T. A. OSBORNE.

Endorsements: N. Y. supreme court. William W. Vanderbilt *ads.* Marshal A. Mathis, collector, &c. Copy answer.

SHEPARD & PARSONS,
Defendant's Attorneys.

16 SUPREME COURT, *County of New York:*

MARSHAL A. MATHIS, collector of all and singular the goods, chattels, and personal estate of JOHN VAN PELT, deceased,

vs.

D. P. VAIL.

First. The plaintiff in this action, by J. T. Williams, his attorney, complains of the said defendant, that the said plaintiff was, by letters of administration duly issued by the surrogate of the city and county of New York, under his hand and seal of office, bearing date the fifteenth day of September, 1854, duly appointed collector of all and

singular the goods, chattels, credits, and personal estate of John Van Pelt, deceased, with all and singular the powers by the statute in such cases given and prescribed. That heretofore, to wit, at divers and sundry times during the lifetime of the said John Van Pelt, and between the first day of September, 1853, and the first day of September, in the year 1854, at San Francisco, in the State of California, the said defendant received of and from the said John Van Pelt divers and sundry sums of money, amounting in all to the sum of seventy thousand dollars, under and by virtue of an agreement that the same, and each and every part thereof, should be without delay applied and appropriated by the said defendant to, upon, and towards the building, furnishing, rigging, and completing a certain steamboat then in process of building at the city of New York by and for the said John Van Pelt. That the said defendant, although often requested,
17 refused, and has ever since refused, and still refuses, so to apply or appropriate said money; but, on the contrary thereof, the said defendant did, at the time and place aforesaid, convert the said money, and each and every part thereof, to his own use. And the plaintiff says that the said defendant, in consideration of the premises, afterwards, to wit, at the city of New York, on the fifteenth day of September, 1854, promised and agreed to pay to the said plaintiff, as such collector aforesaid, the said sum, with interest thereon from the time of the receipt thereof aforesaid, when he should be thereafter requested so to do; and the plaintiff says that the said defendant, although often requested, has ever since refused and still refuses so to pay said sum, or any part thereof.

Second. And for a second cause of action, the plaintiff says, that the said defendant, at divers and sundry times between the first day of September, 1853, and the first day of September, in the year 1854, at the city of New York, the said defendant received of, and from divers and sundry persons, the heirs of one John Van Pelt, then deceased, divers sums of money, amounting in all to the sum of seventy thousand dollars—money which belonged to the said Van Pelt in his lifetime, and was left in the hands of the persons aforesaid at the time of his death—under and pursuant to an agreement before that time and during the lifetime of said Van Pelt, to wit, on the first day of August, in the year 1853, that the said defendant should receive of and from the said Van Pelt the said sum, and should without delay apply and appropriate the same in and about the building, furnishing, rigging, and completing a certain steamboat in the said city of New York, then in process of building by and
18 for the said Van Pelt. And the plaintiff says, that the said defendant, although often requested, wholly neglected and refused to apply or appropriate the said money to the said building, fitting, rigging, or furnishing of the said steamboat; but, on the contrary thereof, and afterwards and on the day and at the place aforesaid, converted the said money to his own use. And the plaintiff further says, that the said defendant, in consideration of the premises, undertook and agreed, on the said fifteenth day of September, 1854, at the city of New York, and in consideration that the said plaintiff

had on that day been duly appointed, by letters of administration duly issued by and under the seal of office of the surrogate of the city and county of New York, collector of all and singular the goods, chattels, credits, and personal property of the said Van Pelt, to pay the said sum, with interest thereon from the time of the receipt thereof, and of each and every part thereof, to the said plaintiff, as such collector aforesaid, whenever he should be thereto requested; and, although often requested, the said defendant has not yet paid said sum of money, or any part thereof.

Third. And for a third cause of action, the plaintiff says, that heretofore, to wit, on the ninth day of September, at the city of New York, the said defendant had in his possession a certain steamboat called the "Adelaide," with her tackle, apparel, boats, and furniture, which belonged to and was the property of one John Van Pelt, deceased, and of which the said Van Pelt died the owner. That on the day and at the place aforesaid the said defendant converted the said steamboat, her tackle, apparel, boats, and furniture, to his own use. That by letters of administration, duly issued by the surrogate of the city and county of New York, under his hand and official seal,
19 bearing date the fifteenth day of September, 1854, the said plaintiff was duly appointed collector of all and singular the goods, chattels, credits, and personal property of the said John Van Pelt, deceased, with all the power and authority by the statute in such case given and prescribed. That on the day and at the place last aforesaid, the said defendant, in consideration of the premises, undertook and promised to pay the said plaintiff the sum of seventy thousand dollars, the worth and value of the said steamboat, her tackle, apparel, boats, and furniture, when he should be thereto requested.

And the plaintiff says, that, although often requested, the said defendant has not yet paid the said sum of seventy thousand dollars, or any part thereof.

Wherefore he demands judgment against the said defendant for the said sum of seventy thousand dollars, with interest thereon from the first day of September, 1854, besides the costs of this action.

J. T. WILLIAMS, *Pl'ff's Att'y.*

(Copy.)

SUPREME COURT, *County of New York:*

MARSHAL A. MATHIS, collector of all and singular the goods, chattels, personal estate, and credits of JOHN VAN PELT, deceased, *against* DAVID P. VAIL.	Summons for a money demand on contract. (Com. not served.)

To the above defendant:

20 You a e hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the county of New York, and to serve a copy of your answer on

me at the city of New York within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within twenty days as aforesaid, the plaintiff in this action will take judgment against you for the sum of seventy thousand dollars, with interest from the first day of January, one thousand eight hundred and fifty-four, besides costs of this action.

Dated September 22, 1854.

J. T. WILLIAMS,
Plaintiff's Attorney, No. 11 *Wall st., N. Y.*

Endorsement: Supreme court. Marshal A. Mathis, collector, &c., *vs.* Daniel P. Vail. Copy sum's and comp'lt.

J. T. WILLIAMS, *Pl'ff's Att'y.*

NEW YORK SUPREME COURT, *County of New York:*

David P. Vail *ads.* Marshal A. Mathis, collector (as stated) of all and singular the goods, chattels, and personal estate of John Van Pelt, deceased.

21 David P. Vail, the defendant, by Thomas Fessenden, his attorney, in answer to the complaint in this action, states and shows to the court:

First. That he denies that the plaintiff in this action was or has ever been in any way whatever appointed by the surrogate of the city and county of New York collector of all and singular the goods, chattels, credits, and personal estate of John Van Pelt, deceased, mentioned in said complaint, with the statutory powers given to such a collector.

And said defendant, further answering, denies that at any time or times between the first day of September, in the year 1853, and the first day of September, 1854, or between any other two periods in the lifetime of said John Van Pelt, at San Francisco, mentioned in said complaint, or at any other place, he received from said Van Pelt any money or sum or sums of whatever, under or by virtue of any agreement that such money or moneys should be applied or appropriated by this defendant to, upon, or towards the building, furnishing, rigging, or completing any steamboat whatever then in process of building at the city of New York by or for said Van Pelt, or any one else, or under or by virtue of any agreement whatever, or for the purpose aforesaid, in any way or for any purpose; and denies that he ever received from said Van Pelt, in his lifetime, any money, to be applied or appropriated to the purpose above mentioned, which this defendant ever refused to apply or appropriate to such purpose, or converted to his own use.

And the said defendant, further answering, denies that on the 15th day of September, 1854, or at any other time, he ever promised
22 or agreed, on any consideration or otherwise, to pay the plaintiff, as such collector as above mentioned, or in any other capacity, the sum of seventy thousand dollars, first mentioned in said com-

plaint, or any other sum of money, with or without interest, upon request or otherwise.

And the said defendant, in answer to what is mentioned in said complaint as a second cause of action, says, that he denies that at any time or times between the first day of September, 1853, and the first day of September, 1854, or between any other two periods, at the city of New York or elsewhere, this defendant received from any person or persons, being an heir or heirs of said John Van Pelt, the deceased, moneys amounting to seventy thousand dollars, or any other sum, being money which belonged to said Van Pelt in his lifetime, and was left in the hands of such person or persons aforesaid at the time of the death of said Van Pelt, or any other money, under or pursuant to any agreement, before that time and during the lifetime of said Van Pelt, that this defendant should receive of and from said Van Pelt said sum of seventy thousand dollars, or any other sum, and should apply or appropriate the same in or about the building, furnishing, rigging, or completing any steamboat in the city of New York or elsewhere, then in process of building for said Van Pelt or otherwise however. And said defendant also denies that he ever received any money from any person or persons, an heir or heirs of said Van Pelt, to be applied or appropriated as last above mentioned, and then neglected or refused so to apply or appropriate the same, or converted the same to his own use. And said defendant also denies
23 that he ever undertook or agreed, at the city of New York or elsewhere, in consideration that the plaintiff, on the fifteenth day of September, 1854, or at any other time, had been appointed by letters of administration, issued by or under the seal of the surrogate of the city and county of New York, or otherwise however, collector of the goods, chattels, credits, or personal estate of said John Van Pelt, or for any other consideration, to pay said last-mentioned sum of seventy thousand dollars, or any other sum of money, with or without interest thereon, from any time, to the plaintiff, as such collector as aforesaid, or otherwise, upon request or otherwise.

And the said defendant, in answer to what is mentioned in said complaint as a third cause of action, says, that he denies that on the ninth day of September, or at any time, he had in his possession a steamboat called "The Adelaide," with her tackle, apparel, or furniture, or any other steamboat which ever belonged to John Van Pelt, deceased, mentioned in that part of said complaint which professes to state said alleged third cause of action, or of which he, said John Van Pelt, died the owner; and also denies that he ever converted any such steamboat last aforesaid, her tackle, apparel, boats, or furniture, or any part thereof, to his own use.

And the defendant also denies that by letters of administration mentioned in said last-mentioned part of said complaint, or otherwise, the plaintiff was, on the fifteenth day of September, 1854, or at any other time, appointed collector of the goods, chattels, credits, and personal property of said last-mentioned John Van Pelt, deceased, with the power or authority mentioned in said last-mentioned part of

said complaint. And the defendant also denies that he ever, on
24 any day or at any place, on any consideration, undertook or promised to pay the plaintiff the sum of seventy thousand dollars, upon request or otherwise, or that such sum was the worth or value of said last-mentioned steamboat, her tackle, apparel, boats, and furniture.

THOMAS FESSENDEN,
Att'y for Def't.

Endorsements: N. Y. supreme court. D. P. Vail *ads.* Marshal A. Mathis. Copy answer.

THOS. FESSENDEN, *Deft's Att'y.*

MAINE DISTRICT, *ss:*

OFFICE OF THE CLERK C. C. U. S.

I, Geo. F. Emery, clerk of the circuit court of the United States for said Maine district, hereby certify that the foregoing documents were handed to the presiding justice by one of the counsel of the respondents in the case of Charles Scudder, administrator, against the Calais Steamboat Company, at the close of the argument at the hearing, and were passed to the undersigned clerk, by said justice, on the twentieth day of May, A. D. eighteen hundred and sixty-two, but were never seen by said clerk until the day last mentioned, and were never otherwise filed in the case. I further certify that upon the envelope covering the same are the following endorsements:

"Messrs. Hutchins & Wheeler, counsellors, Boston, Mass."

"Scudder *v.* Calais Steamboat Co. Pleadings in suit in New York; filed *in manuscript by consent.*"

25 In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-two.

GEO. F. EMORY, *Clerk.* [L. S.]

Memo.—The envelope above referred to, and the letter accompanying and enclosed in the same, are hereto annexed.

GEO. F. EMORY, *Clerk.*

Messrs. Hutchins & Wheeler, counsellors, Boston, Mass.

Scudder *vs.* Calais Steamboat Company. Pleadings in suits in New York; filed in manuscript by consent.

26 GENTLEMEN: Enclos'd find copies of pleadings in the two cases, which I have finally obtained after huge trouble.

The clerk says he *can't* certify to any papers which have never been filed; and that the uniform practice *here* is to take the depos. of att'ys. The pleadings may not be closed under "The Code," and he, the clerk, don't know what else may be filed as part of the issue!

The papers will cost your client, for clerk making copies $2 75
Time and trouble in the matter, say 2 25

$5

which you may send, if right.

I am, truly, yours,

CHAS. V. EMERSON.

51 LIBERTY ST., *June* 6, 1859.

Messrs. HUTCHINS & WHEELER.

27 *Adelaide expense.*

1854.

Creighton & Black	36 00
Hitchcock & Dunn	177 00
Corey & Sons	80 61
Smith & Blanck	809 92
Wm. Tufts	45 00
W. Ramsey	30 00
T. S. Randelet	419 52
J. B. Downing	125 25
Brooklyn Glass Co	61 00
Brooks & Cummings	468 77
R. M. Squier	413 50
Peterson & Humphrey	40 94
Jarome & Co	22 75
Blanch & Smith	17 74
Guion, Russel & Co	612 00
J. McCollery	17 25
Geo. W. Harris	31 00
J. D. Harris	17 61
S. Longee	49 26
Wm. Ramsey	4 00
Doremus & Nixon	1,616 68
Expense of crew at and to New York	90 00
Paid carting coal	9 00
" labor on spars	50
" paper for handbills	1 60
Deming & Sons	4 50
Freight per James Porter	8 08
1 yardstick	50
Wm. H. Thomas	14 00
Ex. on remittance, Doremus & Nixon	4 00
Bill for trucks	43 50
Jos. Hutchings	106 09
Paid insurance, 30,000, Sep. 1 to Jan'y 1	1,233 84
R. C. Spaulding	28 00
C. R. Morse & J. C. Blake	6 65
C. C. Norton	8 50
B. Loring & Co	1 63

Adelaide expense—Continued.

Roe, Lockwood & Co		1 94
W. W. Rose		2 50
Mary Quin		11 66
Amount car'd over, (footing should be 6,672 29)		6,671 29
28		
Amount brought over, (should be 6,672 29)		6,671 29
F. & Hicks		30 11
Crey & Sons		1 75
W. Wallace		6 00
J. L. Boroman		1 00
B. Lowring & Co		1 88
A. S. Morse		1 52
J. Witherby		20 12
W. Waterman		58 60
J. Witherby		7 42
J. Bucknam		2 00
W. H. Adams		1 75
W. H. Thomas		9 00
C. C. Norton		27 75
J. W. Thomas		1 00
J. D. Harris	1 43	
	1 19	
		2 62
J. Bucknam		12 00
N. Constable		357 80
J. D. Harris		32 58
J. C. Nichols, labor on wharf		7 00
" telegraphing		2 00
O. Lapham		4 50
Chelsea Laundry		35 66
J. McKenney		34 02
Peter Kelley		1 68
J. C. Nichols		50
E. G. Alden		135 00
J. Nichols, paid cracking coal		10 00
" dockage, Sep		200 00
Endicott & Co		155 00
Ins., 30,000, Sep. 1 to Jan'y 1		1,236 40
Epes Sargent		70 00
J. H. Noble		123 12
L. Haskell		5 00
W. H. Thomas		24 00
L. Peabody		26 21
Deming & Sons		40 79
Paid pilot out of New York		31 50
Peter Kelley		2 80
(Should be 9,392 37)		9,400 77

Adelaide expense—Continued.

29	Amount brought up, (should be 9,392 37)		9,400 77
	J. C. Nichols, for extra labor		3 20
	Whiton, Train & Co		305 62
	Lawton & Co		19 85
	M. Riley		82 07
	"		5 00
	J. Bartoe		346 05
	Chelsea Laundry		45 41
	E. G. Alden		121 00
	F. D. Chase		11 13
	J. C. Nichols		200 00
	Custom-house, Eastport		109 10
	L. Glenthorn		17 75
	C. Nielen		3 50
	J. Witheherby		11 23
	C. C. Eaton		61 61
	J. Bucknam		58
	S. Thaxter & Son		1 50
	W. H. Thomas		98 98
	J. Hawley		4 50
	J. Marshal		11 50
	A. J. Wilkinson		1 45
	C. C. Norton		29 00
	Washing bills	11 36	
		12 00	
			23 36
	J. Witherty		8 03
	— Hegan		1 60
	Treadwell & Mansfield		24 00
	Pay-roll for September		1,089 24
	J. Robbins		10 50
	Pay-roll for October		1,195 21
	J. Witherby		1 92
	E. R. Morse		7 85
	G. H. Lewis		31 85
	C. C. Norton		55 00
	J. Witherby		3 95
	Custom-house, Eastport		118 65
	Waterhouse, Cross & Co		126 32
	"		53 50
	" passage refunded	59 85	
		16 22	
			76 07
	C. C. Eaton		244 05
	Amount carried over, (13,953 50)		13,962 60

1854.	Amount brought over, (should be 13,953 50)		13,962 60
	J. Witherby		2 35
	Pettingill & Donnell		596 22
	J. C. Nichols		13 29
	J. S. Potter & Co		10 80
	J. C. Nichols		1 25
	W. H. Austin		3 50
	G. C. White		43 45
	J. C. Nichols, dockage, Nov		200 00
	½ amo. paid carting coal		12 25
	M. Benjamin		27 94
	J. Witherby	5 52	
		4 70	
			9 22
	J. Marsh & Co		1 50
	B. M. Flint, extra labor		2 00
	J. Witherby		5 27
	R. H. Spaulding		32 43
	C. C. Eaton		63 52
	Custom-house at Eastport		92 08
	R. A. Spaulding		1 12
	C. C. Eaton, Jere. Witherby		2 87
	F. W. Lincoln		18 00
	Lewis, water bills		17 75
	Custom-house, Eastport, for Dec		22 52
	A. Reed, mate, extra labor		5 80
	B. M. Flint		49 92
	Pay-rolls for November		1,191 68
	Jere. Witherby		19 67
	Lewis, water bills		14 00
	M. Benjamin, washing		14 72
	Nable & Carlton		3 50
	W. D. Jones		8 00
	Pond & Dundee		11 50
	W. H. Thomas	12 25	
		2 00	
			14 25
	A. Reed, mate, extra labor		9 37
	S. W. Fuller		70
	Extra labor, moving boat	4 00	
		8 00	
			12 00
	Pay-roll for December		897 78
	Shepard & Co.		8 40
	C. C. Eaton		72 08
	W. H. Thomas		3 50
	Amount carried over, (17,469 70)		17,468 60

Adelaide expense—Continued.

31

1854.	Amount brought up, (should be 17,469 70)			17,468 60
	French, Wells & Co			27 84
	Waterhouse, Cross & Co			1,285 99
	Do	Trip 7 & 8		1,019 81
	Do	9 & 10		94 18
	Do	11 & 12		85 25
	Do	13 & 14		25 32
	Do	15 & 16		23 76
	Do	17 & 18		9 35
	Do	19 & 20		44 98
	Do	21 & 22		21 13
	Do	23 & 24		195 95
	Do	25 & 26		38 90
	Chas. H. Dyer, bill of oil			95 63
	Leonard Peabody, bill of discounts			92 44
	Do	expenses		87 50
	Do	agency		75 00
	Peter Kelley			3 75
	J. Esty, dist. on bill			2 17
	Chelsea Laundry			61 40
	Nickerron & Howes			27 87
	S. S. Gay			3 25
	J. S. Potter & Co			9 00
	E. G. Alden	102 40		142 00
	Whiton, Train & Co.	53 38 40 04		93 42
	J. Gunnison, dist. on bills			4 25
	Internation. Journal			6 25
	½ W. B. Guy			3 67
	½ J. C. Nichols, paid labor			1 25
	Jere. Witherby, 7 bills			138 00
	J. C. Nichols, dockage			166 67
	Geo. White			84 50
	Geo. Larston & Co			38 47
	E. H. Vose & Co			173 56
	Alien com'rs bills			276 00
	E. H. Vose & Co			60 45
	W. P. Tenney			16 36
	J. Gunnison, dist. 83; Peter Kelley, 2 25			3 08
	J. C. Sampson			419 18
	B. Bartoe			10 50
	Amount carried over, (should be 22,437 78)			22,436 68

Adelaide expense—Continued.

32

1854.

Amount brought over, (22,437 78)		22,436 68
W. Hustin		8 25
Steamboat bill, towing		15 00
Chelsea Laundry		55 60
J. S. Potter & Co		5 40
Wm. E. Coffin & Co		11 50
Do		31 47
Noah Lincoln, jr		43 00
R. Doran		10 00
Pettengill & Donnell		67 30
Nason & Cleaveland		308 50
Freight bills, uncollected		7 45
Water bills		51 38
Lewis Osborn		15 50
H. Doane		2 75
Noah Litchfield		69 22
Path Finder, adv		6 91
½ Leonard Peabody's bill		44 82
½ J. Jackson		4 25
Rent of wharf at Eastport		250 00
(Should be 23,446 08)		23,444 98

33

Joint expense, Adelaide and Eastern City.

1854.

Leonard Peabody		87 68
J. C. Nichols, pd. Donahoe for Barrows	53 00	
Postages	8 51	
Carting	11 50	
Telegraphing	6 50	
Wheeling coal	6 88	
Williams's work on wharf	20 00	
		106 39
Waterhouse, Cross & Co., trip 304		156 75
Deming & Sons, telegraphing	3 91	
Do ..... pd. for desk	3 00	
Do ..... do. ex. on remittance	6 51	
Do ..... do. J. Nichols	11 00	
		24 42
Do ..... do. telegraphing	3 60	
Do ..... do. Pm. J. C. N	5 00	
Do ..... do. Deming expenses	12 63	
Do ..... do. J. H. Noble	25 50	
Do ..... do. W. H. Thomas	3 50	
Do ..... do. p. telegraphing	34	
		50 57

1854.	Thomas Johnson, collecting freight		116 12
	Treasurer's salary		700 00
	Deming & Sons, paid telegraphing		4 31
			1,246 24

34

Coal account.

Sept. 12.	Amount on hand ....575 tons		4,600 00
26.	E. A. Souder & Co..272 " p. Molunkus		1,655 88
	" " 260 " " Leni		1,575 02
	Paid freight, Leni		520 00
	" wheeling and puting same		26 00
	" steamer Admiral, 112 tons		896 00
	" freight for Molunkus		544 00
	" trimming same		34 00
Oct. 18.	E. A. Souder & Co., 239 tons		1,435 41
	Pd. prem. on remittances, ac. coal		32 16
	" p'ting coal		8 43
	" M. Tarbox & Co., interest on coal ac		10 17
22.	J. C. Nichols, wheeling coal		12 25
	Noah Lincoln, 172 tons		1,462 00
	Eastern Steamboat Co., 290 $\frac{1695}{2}$		2,471 90
Nov. 27.	Bacon, Price & Co		1,387 29
	Brig Velona	363 43	
		167 06	
			530 49
	J. W. Bass, 278 tons		2,302 17
	J. C. Nichols, carting coal		1 50
	Seth Whittier, 70½ tons		599 25
			20,113 92
1855.	(Should be 20,102 92)		
January.	Less amount on hand	8,000 00	
	" sold	259 55	
			8,259 55
	Balance		11,854 37
	" (should be 11,844 37)		

35

Recapitulation.

1854.		
Amount of expense account		23,444 98
$\frac{1}{2}$ " of joint expense		623 12
$\frac{3}{5}$ " of coal used		7,112 61
" of balance steward's account		1,760 30
" of head money		389 50

Amount received from passengers		17,947 79
" " for freight		7,988 20
" " " state-rooms		746 00
Balance		6,648 52
	33,330 51	33,330 51

Recapitulation revised.

Amount of expense account	23,446 08	
" of joint expense	623 12	
" of coal used	7,106 61	
" balance steward's account	1,760 30	
" head money	389 50	
Amount received from passengers		17,947 79
" " for freight		7,988 20
" " state-rooms		746 00
Balance		6,643 62
	33,325 61	33,325 61

36 *Adelaide expense.*

1855.

P'd fire insurance, 3 mo's	150 00
J. W. Marshal, acct. wages	33 33
R. Doren "	10 00
J. W. Marshal "	86 67
E. A. Winchester "	100 00
A. Reed & N. R. Jones	80 00
E. A. Vose & Co., painting	1,250 00
Insurance, 30,000, to Dec. 20	2,582 54
Albert Reed	50 00
S. H. Litchfield & Co.	642 64
B. Bartol	757 68
J. E. Simpson	618 65
B. Loring & Co	7 45
H. B. Nicholson	
J. Witherly	
C. C. Norton	
L. H. Waterhouse	
Jere. Witherby	
C. C. Eaton	
Albert Reed	1 88
W. H. Thomas	10 00
Pay-roll for April	1,037 44
Water bills, "	16 00
Jere. Witherby	5 85

Adelaide expense—Continued.

1855.			
	E. Nute		9 93
	Aaron Hastings		75
	Wm. Goodwin		267 61
	Stephen Smith		3 00
	M. Benjamin		8 40
	Eastport Custom-house		66 90
	C. C. Norton	5 00	
		15 84	
			20 84
	J. W. Marshal		133 32
	J. Witherby		5 41
	Leonard Peabody		84 05
	D. Prouty & Co		158 43
	Deming & Sons		18 00
	Whitney, Hamilton & Co		82 97
	J. E. Simpson		94 44
	B. Bartol		6 45
	J. E. Simpson		444 65
	(Should be 8,845 28)		9,355 85
37	Amount brought up, (should be 8,845 28)		9,355 85
	Pettingill & Donnell		107 33
	J. Uran		6 75
	Deming & Sons, repairing hose		2 50
	Dry-dock bill		394 42
	John Ferris		25 00
	W. H. Saddler		18 00
	E. B. Winchester		100 00
	W. Jones		30 00
	Isaac Ray		40 00
	N. Litchfield		153 80
	John Ferris		17 00
	W. Hunt & Co		24 20
	Lewis Osborn		61 50
	W. Whitlock		2 75
	Pay-roll for May		1,183 90
	E. B. Winchester, for March		100 00
	C. C. Norton		9 12
	F. W. Lincoln		5 75
	J. Witherby		7 65
	W. Tisdale		2 43
	C. C. Eaton		78 33
	W. Goodwin		260 95
	Pettingill & Donnell		134 76
	Deming & Sons		15 88
	Leonard Peabody		60 26
	Grand junction wharf		214 00

Adelaide expense—Continued.

1855.

Deming & Sons, for rubber rings		1 87
Custom-house, Eastport		80 56
Geo. W. Lewis		17 50
Jere. Witherby		9 99
W. H. Thomas		7 50
J. Witherby		3 42
W. B. Nicholson		2 88
Geo. Lanton		6 00
L. W. Waterhouse, trip 9 & 10 and 11 & 12		123 05
Jere. Witherby		2 46
Washing bill		13 65
Jere. Witherby		3 00
Custom-house at Eastport		129 46
(Should be 12,302 90)		12,813 47
38		
Amount brought forward, (sh'd be 12,302 90)		12,813 47
C. C. Eaton		73 82
Jere. Witherby		3 00
Pay-roll for June		1,176 21
Deming & Sons		17 77
E. A. Vose & Co.	100 02	
	31 74	
		131 76
Pettingill & Donnell		51 47
Leonard Peabody		66 43
L. H. Waterhouse		24 98
J. Witherby		3 70
Robert Spear		15 00
W. H. Thomas		13 50
C. C. Norton	2 38	
	9 00	
		11 38
Jere. Witherby	2 30	
	3 74	
		6 04
Geo. W. Lewis, 4 bills		12 00
Strout & Bradford		3 50
King & Dexter		4 20
M. Benjamin		13 46
Custom-house, Eastport		102 73
Pay-roll for July		1,215 14
C. C. Eaton		104 43
Wm. Goodwin	3 60	
	3 13	
	1 40	
	7 40	
		15 53
Jere. Witherby		77 97

Adelaide expense—Continued.

1855.			
	E. Nute		9 93
	Aaron Hastings		75
	Wm. Goodwin		267 61
	Stephen Smith		3 00
	M. Benjamin		8 40
	Eastport Custom-house		66 90
	C. C. Norton	5 00	
		15 84	
			20 84
	J. W. Marshal		133 32
	J. Witherby		5 41
	Leonard Peabody		84 05
	D. Prouty & Co		158 43
	Deming & Sons		18 00
	Whitney, Hamilton & Co		82 97
	J. E. Simpson		94 44
	B. Bartol		6 45
	J. E. Simpson		444 65
	(Should be 8,845 28)		9,355 85
37	Amount brought up, (should be 8,845 28)		9,355 85
	Pettingill & Donnell		107 33
	J. Uran		6 75
	Deming & Sons, repairing hose		2 50
	Dry-dock bill		394 42
	John Ferris		25 00
	W. H. Saddler		18 00
	E. B. Winchester		100 00
	W. Jones		30 00
	Isaac Ray		40 00
	N. Litchfield		153 80
	John Ferris		17 00
	W. Hunt & Co		24 20
	Lewis Osborn		61 50
	W. Whitlock		2 75
	Pay-roll for May		1,183 90
	E. B. Winchester, for March		100 00
	C. C. Norton		9 12
	F. W. Lincoln		5 75
	J. Witherby		7 65
	W. Tisdale		2 43
	C. C. Eaton		78 33
	W. Goodwin		260 95
	Pettingill & Donnell		134 76
	Deming & Sons		15 88
	Leonard Peabody		60 26
	Grand junction wharf		214 00

Adelaide expense—Continued.

1855.			
	Deming & Sons, for rubber rings		1 87
	Custom-house, Eastport		80 56
	Geo. W. Lewis		17 50
	Jere. Witherby		9 99
	W. H. Thomas		7 50
	J. Witherby		3 42
	W. B. Nicholson		2 88
	Geo. Lanton		6 00
	L. W. Waterhouse, trip 9 & 10 and 11 & 12		123 05
	Jere. Witherby		2 46
	Washing bill		13 65
	Jere. Witherby		3 00
	Custom-house at Eastport		129 46
	(Should be 12,302 90)		12,813 47
38			
	Amount brought forward, (sh'd be 12,302 90)		12,813 47
	C. C. Eaton		73 82
	Jere. Witherby		3 00
	Pay-roll for June		1,176 21
	Deming & Sons		17 77
	E. A. Vose & Co.	100 02	
		31 74	
			131 76
	Pettingill & Donnell		51 47
	Leonard Peabody		66 43
	L. H. Waterhouse		24 98
	J. Witherby		3 70
	Robert Spear		15 00
	W. H. Thomas		13 50
	C. C. Norton	2 38	
		9 00	
			11 38
	Jere. Witherby	2 30	
		3 74	
			6 04
	Geo. W. Lewis, 4 bills		12 00
	Strout & Bradford		3 50
	King & Dexter		4 20
	M. Benjamin		13 46
	Custom-house, Eastport		102 73
	Pay-roll for July		1,215 14
	C. C. Eaton		104 43
	Wm. Goodwin	3 60	
		3 13	
		1 40	
		7 40	
			15 53
	Jere. Witherby		77 97

Adelaide expense—Continued.

1855.			
	J. H. Shattuck		1 00
	Noah Lincoln, jr		3 25
	M. Riley		42 23
	Luke Brooks, jr		41 50
	W. H. Hustin		2 25
	J. M. Holden		12 00
	Chelsea Laundry		48 11
	Jere. Witherby		67 29
	Dr. Dailey, overcharge		40
	E. Snow & Co	194 80	
		290 41	
			475 21
	L. H. Waterhouse	17 46	
		28 04	
		9 25	
		6 00	
			60 75
	Jere. Witherby	80	
		2 30	
		.1 60	
		3 30	
			8 00
	C. C. Norton		18 87
	B. Loring & Co		2 38
	M. Benjamin	16 90	
		15 27	
			32 17
	Chs. Dyer		3 00
	Hinkley & Egery		43 57
	(Should be 16,308 90)		16,819 47
39	Amount brought forward, (should be 16,308 90.)		
	Pay-roll for August		1,190 76
	Wm. Goodwin, extra labor		31 15
	Seth W. Fuller, 2 bills		13 64
	W. Goodwin		1 83
	Jere. Wetherby		13 67
	Chelsea Laundry		47 20
	Wm. Goodwin, 1 mo. wages		50 00
	W. H. Hustin		1 75
	White & Chase		136 67
	Jere. Witherby		49 69
	Agers & Weible		29 25
	Boston Belting Co		19 56
	Leonard Peabody		72 50
	B. Bartol	201 61	
		96 75	
			298 36

Adelaide expense—Continued.

1855.	Boston water bill		121 11
	Alanson Long		64 00
	Kelly & Cunningham		4 50
	French, Wells & Co		42 44
	W. P. Tenney & Co		15 60
	Lewis Osborne		27 47
	N. Litchfield, jr		81 53
	Custom-house, Eastport		87 75
	C. C. Eaton		106 33
	Wm. Goodwin		246 89
	L. H. Waterhouse	9 35	
		4 93	
		53	
		3 25	
		3 25	
			21 28
	Geo. A. Thayer		9 36
	Jere. Witherby		4 15
	Geo. A. Lewis		24 75
	Jere. Witherby		7 77
	M. Benjamin		16 24
	C. C. Norton	17 50	
		23 56	
			41 06
	Deming & Sons		4 87
	J. Boyd & Sons		247 25
	L. Peabody		62 39
	J. Witherby	5 11	
		4 98	
		4 36	
		5 75	
		8 65	
			28 85
	M. Benjamin, 15 80; J. S. Richardson,	3 50	19 30
	C. C. Eaton		106 39
	Smith & Tarbell		12 96
	L. H. Waterhouse	3 00	
		3 87	
		4 00	
		9 25	
			20 12
	Carried over, (should be 19,689 29)		20,557 78
40	Amount brought forward, (should be 19,689 29)		20,557 78
	B. Loring & Co		1 00
	W. H. Thomas		9 00
	Custom-house, Eastport		88 88
	W. Goodwin		239 82

Adelaide expense—Continued.

1855.

Deming & Sons		66 25
J. Witherby		7 05
C. C. Norton		4 75
L. H. Waterhouse	6 45	
	16 20	
	8 49	
		31 24
W. H. Thomas		6 00
C. C. Eaton		49 62
Custom-house at Eastport		64 85
W. Waterman		3 48
J. Witherby, 53; J. W. Daniel, 1 20		1 73
Leonard Peabody		68 38
J. M. Lincoln		5 50
B. Bartol		21 85
Dry dock		312 44
Kelley & Cunningham		6 75
Whiton, Train & Co		387 56
New England Oil Co		362 51
N. Litchfield		40 87
Kelley & Cunningham		3 75
Deming & Sons		1 17
A. Reed		146 67
C. C. Norton, 6 bills		45 11
J. Witherby, 5 do		27 11
C. Hurd		9 78
C. C. Eaton		157 16
L. H. Waterhouse		193 85
A. Reed		1 25
Custom-house, Eastport		58 85
Pay-roll, Sep		1,149 25
" Oct		1,138 05
" Nov		1,138 83
B. M. Flint		4 25
Custom-house at Eastport		29 44
Wm. Hurd		14 25
J. Witherby		5 00
Geo. A. Thayer		6 00
(Should be 25,598 59)		26,462 10

41

Amount brought forward, (25,598 59)	26,462 10
Valentine & Co	8 96
C. C. Eaton	99 26
Pay-rolls for December	857 66
Wm. Goodwin, extra labor	10 45
Tenney & Co., 2 bills	36 67

Adelaide expense—Continued.

1855.	Jere. Witherby, 2 bills	100 23
	John Clarke	7 73
	Pettingill & Donnell	51 23
	Chelsea Laundry	69 79
	E. G. Alden	29 00
	Jere. Witherby	95 96
	Agers & Widle	8 50
	Wm. Goodwin, extra labor	31 55
	J. E. Daniel & Co	50
	New England Oil Co	3 75
	E. A. Vose & Co	136 54
	Wm. Goodwin	70 52
	Leonard Peabody	101 37
	W. Wyman	50
	F. James	2 58
	John Walker	20 20
	L. H. Waterhouse	450 00
	Counsel fees at St. John	140 00
	G. & E. Sears	4 00
	Provincial revenue	48 45
	R. Moore, jr	39 91
	Treat	7 25
	P. Houghton	30 00
	Leonard Peabody	84 90
	L. H. Waterhouse	1,547 74
	B. M. Flint	182 75
	B. M. Flint	39 00
	Deming & Sons	49 26
	N. Litchfield	47 58
	Shattuch & Jones	2 16
	Jere. Witherby	6 29
	Kelley & Cunningham	1 50
	Lewis Osborn, 3 30; J. Kenney, 18 00	21 30
	Pettingill & Donnell	17 02
	Amount carr'd over, (sh'd be 30,060 65)	30,990 16

42

	Amount brought forward, (30,060 65)	30,990 16
	G. J. Aeres	15 07
	John H. Noble	17 00
	A. & G. T. Sampson	4 03
	Do	258 01
	Albert Reed	25 00
	Whiton, Train & Co	89 01
	F. D. Chase	9 18
	Thos. Ray	25 00
	John A. French	1 33
	Isaac Ray	40 00

Adelaide expense—Continued.

1855.	French, Wells & Co		16 00
	John Ferris		250 00
	½ I. C. Nichols	359 29	179 64
	½ L. H. Waterhouse	411 04	205 52
	½ Wharf rent at Eastport	1,000 00	500 00
		31,695 44	32,621 45
		1,783 29 less	1,783 29
	Should be	29,912 15	30,838 16

43

1855. *Coal account.*

Jan'y 15.	Amount on hand	8,000 00
	S. H. Trotter & Co	1,125 00
	Bacon, Price & Co	1,001 64
	Mayhew, Talbot & Co.	818 56
	Bacon, Price & Co	1,692 69
	Seth Whittier	1,169 00
	L. H. Waterhouse	133 90
	A. Hammond & Co	181 25
	Sch'r Victor	345 00
	Seth Whittier	657 50
	McKellar	253 08
	Sch. Defiance	730 00
	" Governor	378 00
	S. H. Trotter & Co	1,500 00
	Brig J. Fowler	625 00
	" China	356 50
	S. H. Trotter & Co	1,150 00
	"	849 00
	"	1,018 00
	Pm. on remittances	5 75
	Expense on coal by Queen	2 50
	J. C. Nichols, storing & piling coal	123 24
	Brig Argentine	525 00
	W. H. Medlin	475 50
	C. C. Eaton	11 50
	Chs. A. Heekscher & Co	829 90
	L. W. Waterhouse	36 80
	S. H. Trotter & Co	1,187 00
	Bacon, Price & Co	937 89
	Sch. T. H. Rhodes	305 50
	Bacon, Price & Co	1,344 36
	L. H. Waterhouse	330 29
	Sch. Siren, 222 25 ; Wallace, 240	462 25

Coal account—Continued.

1855.

Mayhew, Talbott & Co		1,385 17
L. H. Waterhouse		29 90
"		323 60
S. H. Trotter & Co		1,139 82
"		1,576 00
"		1,087 00
(Should be 34,103 09)		35,676 86

44

Amount brought forward, (34,103 09)		35,676 86
L. H. Waterhouse		183 57
Schr. C. Keller		332 66
Brig Triad		519 95
Leonard Peabody		58 95
Schr. Argonaut		413 75
" Globe		344 00
H. & Sawyer		2,054 22
S. H. Trotter & Co		1,100 00
J. C. Nichols		80 00
John Goddard		2,917 60
(Should be, 42,107 79)		43,681 56
Less amount sold	1,546 88	
" " on hand	6,000 00	
Balance, (should be 34,560 91)	36,134 68	
	43,681 56	

45 *Joint expense.*

1855.

Telegraphing	6 94	
Pm. on remittance	6 98	
Paper for posters	1 50	
Horse hire	2 00	
W. Deming	52 75	
Printing posters	50	
Telegraphing	4 45	
Deming & Sons	12 00	
		87 12
Leonard Peabody		296 26
Pm. on money paid at Boston	15 33	
Telegraph	2 25	
Expense at Boston	22 00	
Carting coal at Portland	3 51	
Harbormaster at St. John	28 50	
		71 59
L. H. Waterhouse, trip 9 & 10	336 00	
" 17 & 18	16 70	
		352 70

Joint expense—Continued.

1855.			
	Frost & Co		71 25
	Geo. Swan's wages on wharf		20 00
	Jere. Witherby		2 97
	Wm. Goodwin, 1 m. wages		50 00
	Peter Kelley		7 68
	T. Wharf, for lumber		15 00
	Postage		1 00
	Interest paid J. Ferris on advances		4 96
	Labor on wood	1 75	
	Telegraph	6 85	
	Posting bills, paper, and tacks	2 51	
	Piling coal at Eastport	31 50	
	1 quarter rent at T. wharf	750 00	
	Pm. on remittance	3 75	
	Telegraph bill for June	8 30	
			804 66
	Leonard Peabody		125 52
	Kelley & Cunningham		15 00
	Deming & Sons		33 43
	Geo. Swan, 1 mo. wages	30 00	
	Telegraphing	24	
	Boston Directory	1 50	
	Lock for hydrant	20	
	W. Goodwin, 1 mo	50 00	
			81 94
	Leonard Peabody		191 92
			2,233 00
46	Amount brought forward		2,233 00
	L. H. Waterhouse, trip 13, 14, 15, 16		90 53
	Telegraphing	20	
	W. Goodwin	16 10	
			16 30
	Leonard Peabody		125 52
	Telegraphing		11 51
	C. C. Eaton		138 86
	W. H. Thomas		26 00
	Telegraph		1 95
	Bill advertising in Canada		23 00
	J. R. & J. F. Farwell	71 13	
		19 50	
			90 63
	International Journal		6 25
	Paid rent on T. wharf		750 00
	Deming & Sons		92 35
	Wharfage at St. John		325 00

1855. *Joint expense*—Continued.

Leonard Peabody			168 68
Miller & McLean	40 58		
Pm. on remittance, J. Ferris	5 00		
Marine telegraph	1 55		
			47 13
Mayhew, Talbot & Co			77 23
Telegraphing	40		
L. H. Waterhouse, 61 and 62	8 50		
			8 90
Wharfage at St. John			325 00
Leonard Peabody			246 61
John Ferris			70 20
Deming & Sons			36 70
Rent on T. wharf	825 00		
J. T. Smith	25 00		
Farwell	13 50		
			863 50
Pm. J. Ferris	7 50		
W. Deming	8 75		
J. Lorimer	6 00		
			22 25
J. Boynton	17 50		
Telegraphing	20		
			17 70
W. Goodwin, 1 mo.	50 00		
Bedstead and lanthern	6 00		
Telegraphing	20		
			56 20
Leonard Peabody	181 66		
	195 56		
			377 22
L. H. Waterhouse	33 69		
	87 75		
			121 44
Deming & Sons			400 08
(Should be 6,769 74.)			6,768 74
47 Amount brought forward, (should be 6,769 74)			6,768 74
Agent & treasurer's salary	800 00		
Postages and stationery	20 00		
			820 00
6,769 74			
820 00			7,588 74
	Less credits		46 61
7,589 84			
46 61			7,542 13
7,543 13			

1855. *Recapitulation.*

Expense account	30,838 16	
Steward's	4,871 18	
½ joint expense	3,771 06	
Adelaide's proportion of coal	21,680 81	
Head money	344 25	
Amount rec'd for passages		33,382 68
freight		19,472 02
state-rooms		1,583 50
Balance		7,067 26
	61,505 46	61,505 46

Recapitulation revised.

Expense ac't	29,912 15	
Steward "	4,871 18	
½ joint expense ac't	3,771 56	
⅘ coal	20,736 54	
Head money	344 25	
Amount rec'd from passengers		33,382 68
" " freight		19,472 02
" " state-rooms.		1,583 50
Balance		5,197 48
	59,635 68	59,635 68

48

1856. *Adelaide expense.*

	E. A. Vose & Co.	943 81
	S. & Boynton Ins. 15,000, 5 mo. to Aug. 3d.	772 59
	A. & G. T. Sampson	332 69
	O. P. Treat	1,654 43
	"	1,378 23
	L. H. Waterhouse	295 95
	Wm. Goodwin	488 15
	"	770 71
	Deming & Sons	743 18
	"	103 75
Jne. 1.	"	954 93
	O. P. Treat	2,553 49
	Wm. Goodwin	894 08
30.	Deming & Sons	509 95
	O. P. Treat	1,429 36
	W. Goodwin	272 14
July 31.	O. P. Treat	2,331 64
	Deming & Sons	659 19

Adelaide expense—Continued.

Aug. 18.	C. C. Eaton		6 08
31.	O. P. Treat		1,580 30
	Deming & Sons		657 12
Sep. 30.	Deming & Sons		714 40
	O. P. Treat		1,609 66
	Wm. Goodwin		314 06
	"		177 84
Oct. 30.	Deming & Sons		148 12
31.	O. P. Treat		1,782 22
Nov. 30.	"		1,083 81
	"		7 00
	W. Goodwin		643 35
	"		89 55
	Deming & Sons	108 32	82 47
	O. P. Treat	10 00	
			118 32
	W. Walcott & Co		141 53
	L. H. Waterhouse		816 96
	Geo. Hayes		235 50
	Queen		5 50
Jan'y 1.	Deming & Sons		1,649 83
	M. Walcott & Co		9 32
	Wm. Goodwin		186 26
49	(Should be 29,147 52)		29,147 52

1856.			
	Amount brought forward	29,147 48	29,147 52
	Deming & Sons	890 45	890 45
		30,037 93	30,037 97
	Less		794 52
	(Should be	29,243 41)	29,243 45

1856.	*Recapitulation.*		
	Expense account	29,243 45	
	Steward	3,241 62	
	Coal account	18,000 00	
	Head money	362 75	
	Wharf rent at Eastport	500 00	
	Balance	31,282 31	
	Amount of passage account		55,203 86
	Freight account		25,244 27
	State-room account		2,182 00
		82,630 13	82,630 13

Recapitulation revised.

Expense account	29,243 41	
Steward	3,241 62	
Coal	18,000 00	
Head money	362 75	
Wharf rent	500 00	
Balance	31,282 35	
Amount of passage account		55,203 86
Freight account		25,244 27
State-rooms		2,182 00
	82,630 13	82,630 13

50 *Adelaide expense.*

1857.		
Feb. 1.	Deming & Sons	130 13
19.	Wm. Goodwin	539 86
28.	" "	246 27
	Deming & Sons	368 69
April 1.	Deming & Sons	1,383 80
May 31.	O. P. Treat	2,589 66
	Wm. Greg & Sons	512 66
Ap'l 30.	Deming & Sons	77 93
	O. P. Treat	2,446 59
May 31.	Deming & Sons	726 55
	O. P. Treat	2,170 64
	W. Goodwin	550 65
June 30.	Deming & Sons	500 26
	O. P. Treat	1,580 41
May 30.	W. Goodwin	532 70
June 30.	"	826 02
Aug. 1.	Deming & Sons	328 12
	O. P. Treat	1,566 94
	Wm. Goodwin	728 02
31.	O. P. Treat	1,587 09
	Wm. Goodwin	221 87
	Deming & Sons	348 77
Sept. 30.	"	130 97
	"	25 43
	O. P. Treat	1,788 85
	Wm. Goodwin	361 05
Oct. 31.	Deming & Sons	383 34
	"	15 50
	O. P. Treat	1,732 13
Nov. 30.	"	1,402 29
Oct. 30.	Wm. Goodwin	127 15
Nov. 30.	"	199 36
	Deming & Sons	39 54

	O. P. Treat		131 92
Dec. 1.	Deming & Sons		1,159 53
31.	Wm. Goodwin		413 61
	Deming & Sons		511 43
	Geo. Thomas		510 80
	J. D. Sargent		3 88
	Deming & Sons		848 26
			29,808 67

51 *Adelaide expense.*

1857.

Amount brought forward		29,808 67
Less		396 64
		29,412 03

Recapitulation.

Expense account	29,412 03	
Coal "	15,422 27	
Steward "	4,448 01	
Head money	298 50	
Warfage at Eastport	500 00	
Balance	14,632 63	
Passage account		40,633 27
Freight "		22,032 17
State-room "		2,048 00
	64,713 44	64,713 44

52 *Adelaide expense.*

1858.

March 1.	Wm. Goodwin	337 48
	Deming & Sons	50 00
April 1.	"	282 62
	Wm. Goodwin	54 40
May 1.	Deming & Sons	204 00
June 1.	O. P. Treat	80 00
7.	E. Snow	872 15
	Deming & Sons	132 15
Aug. 1.	"	174 00
Sep. 1.	Pettingill & Donnell	300 00
	Wm. Goodwin	127 87
	Deming & Sons	139 62
Nov. 1.	"	0 00
Dec. 1.	"	708 18

Adelaide expense—Continued.

	Wm. Goodwin	31 64
31.	"	289 40
Oct. 1.	"	75 00
	Deming & Sons	300 00
	"	276 00
	T. L. Weymouth	1 00
	J. S. Carpenter	25 00
	J. G. Rice	22 00
	Isaac Ray	50 00
		4,532 51
	Less	106 04
		4,426 47

53

1859.

Feb. 1.	Wm. Goodwin	278 40
Mar. 1.	"	4 50
31.	Deming & Sons	344 44
April 30.	T. M. Mayhew & Co	600 00
	Wm. Goodwin	14 35
	Litchfield & Trufant	46 54
	H. T. Holmes	10 92
	Eastern railroad	81 31
May 31.	M. Farras	110 00
	Wm. Goodwin	218 71
June 30.	Wm. Deming	15 50
	T. M. Mayhew & Co.	944 92
	M. Farras	40 00
	Lewis Burgin	3 00
	T. D. Chase	12 28
	Lewis Osborne	2 07
		2,726 63
	Deduct com. ch'g'd on sale	690 62
		2,036 01

54	Dr.	Cr.
1854.	6,648 52	
1855.	7,067 26	
1856.		31,282 31
1857.		14,632 63
1858.	4,426 47	
1859.	2,726 63	
		3,000 00

General recapitulation.

1854.	There was a loss of	6,643 62	
1855.	" " "	5,197 48	
1856.	" " gain of		31,282 35
1857.	" " gain of		14,632 63
1858.	" " loss of	4,426 47	
1859.	" " gain of $3,000, less $2,036 01		963 99
	Balance of gain	$30,611 40	
		46,878 97	46,878 97

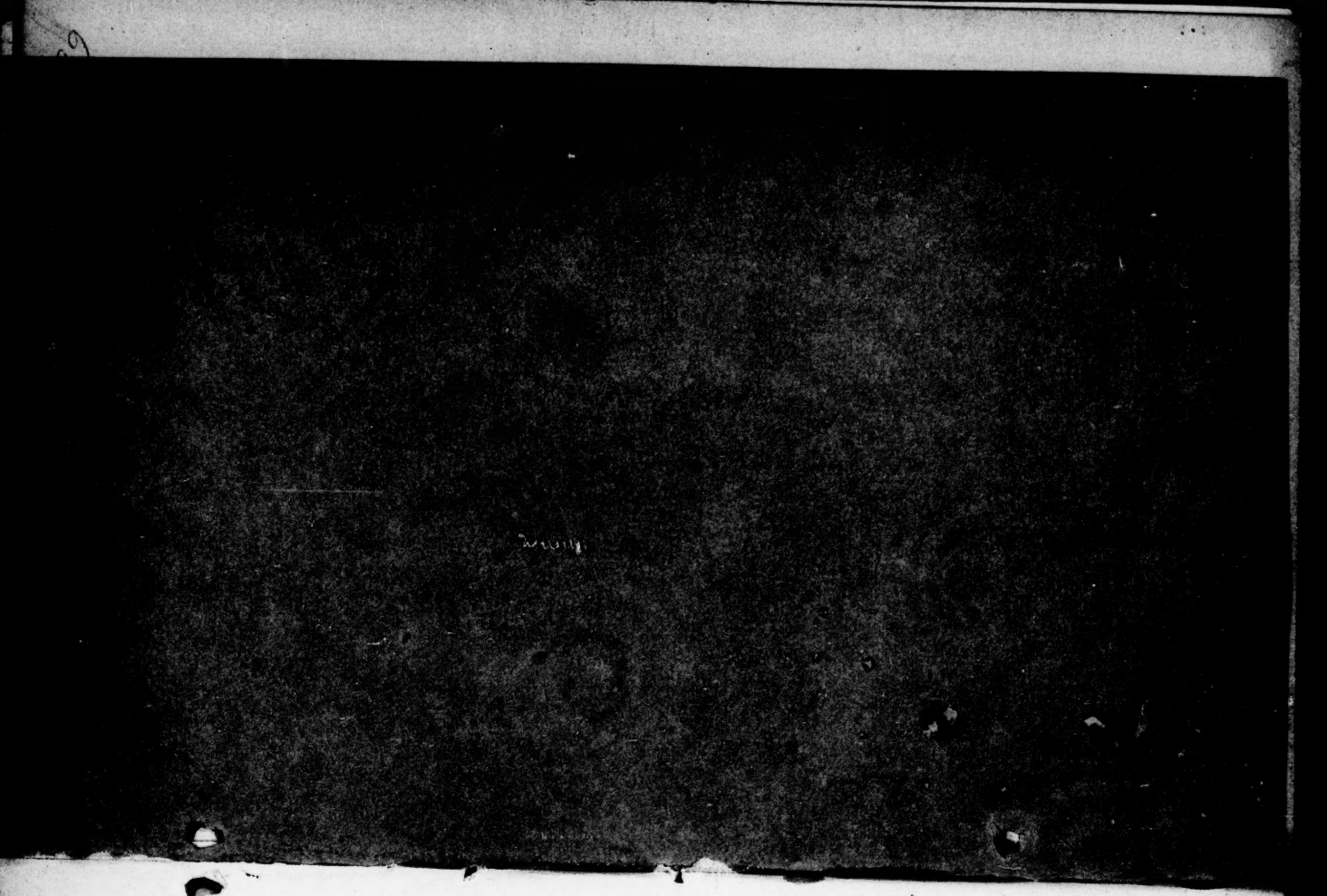
55 DISTRICT OF MAINE, *ss:*

OFFICE OF THE CLERK C. C. U. S.

I, Geo. F. Emery, clerk of the circuit court of the United States for the district of Maine, hereby certify the foregoing to be a true and perfect copy of the original account rendered by the respondents before the master, and by him returned, and now on the record files in this office, in the case of Charles Scudder, administrator in equity against the Calais Steamboat Company, excepting that the figures and memoranda now appearing thereon in *red ink* were made by the master in his examination of said account, and in making up his report thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this fourteenth day of October, [L. S.] A. D. 1862.

GEO. F. EMERY,
Clerk C. C. U. S.



Supreme Court of the United States.

No. 98.

THE CALAIS STEAMBOAT COMPANY, APP'TS,

vs.

CHARLES SCUDDER, ADMINISTRATOR OF JOHN VAN PELT, DECEASED.

BRIEF OF APPELLANTS.

Supreme Court of the United States.

No. 98.

THE CALAIS STEAMBOAT COMPANY, APP'TS,

vs.

CHARLES SCUDDER, ADMINISTRATOR OF JOHN VAN PELT, DECEASED.

BRIEF OF APPELLANTS.

ABSTRACT.

This is a bill in equity, by the administrator of John Van Pelt, deceased, formerly of San Francisco, appointed under an ancillary administration, in the State of Maine, October 2, 1855, against the appellants for the conveyance to the appellee of $\frac{13}{20}$ of the steamer Adelaide, which vessel the appellants purchased of William W. Vanderbilt, in New York, on the 3d day of August, 1854, paying $5,000 at the date of the execution of the contract, $15,000 August 23, and the remainder of the purchase money September 9, 1854, the date of the bill of sale.

See Letter of Administration, Record, p. 261.
Depos. of Deming, 7 Ans. Record, p. 189.

In May, 1853, said Vanderbilt, then in San Francisco, made an arrangement with said John Van Pelt, by which Vanderbilt was to proceed to New York and build a steamboat, to make all the contracts in his own name, and have the boat, when completed, enrolled at the Custom House in his own

name, and take the vessel when completed to San Francisco, and, on her arrival there, convey to said Van Pelt $\frac{18}{20}$ of said vessel, and retain $\frac{2}{20}$ himself, Van Pelt to furnish the requisite funds for building, *but his interest to be kept secret.*

Depos. of Vanderbilt, 14 Ans. Record, pp. 229, 230.
Depos. of Chenery, 5 and 6 Ans. Record, p. 66.
Depos. of Janes, 11 Ans. Record, p. 51 and 5, Ans. and p. 52.

Subsequently Van Pelt sent instructions to Vanderbilt by one D. P. Vail, who was sent on to New York by Chenery and Van Pelt to take charge of the vessel after she was built, and take her to California, to have the boat enrolled, when completed, as follows: —

"I wish the bill of sale to be made, for D. P. Vail $\frac{10}{20}$, R. Chenery $\frac{4}{20}$, R. M. Jessup $\frac{3}{20}$, W. W. Vanderbilt $\frac{2}{20}$, and Frank Johnson $\frac{1}{20}$."

Letter of John Van Pelt to Vanderbilt, Sept. 1, 1853, Record, p. 149.

But his interest still to be kept secret.

"He (Van Pelt) says, also, write that you (Vanderbilt) are not to know that he has any interest in the boat, and that you must be more particular in talking and writing about her and her destination."

Letter of Payson to Vanderbilt, Sept. 13, 1853, Record, p. 150.

"Mr. Van Pelt was anxious that his name should not appear in the contract or anything appertaining to the boat, and he urged upon me the necessity of keeping it secret, and not let it be known that he had anything whatever to do with the boat. I cannot state why any part should be enrolled in my name except that he desired it, and would not state to me why it was so."

Vail's Depos., answer to 9th interrogatory, Record, p. 207.

Said Van Pelt died at San Francisco September 29, 1853, and Richard Chenery (who was also a part owner of the boat, and the same person referred to in Van Pelt's letter of September 1, 1853, Record, p. 149) and Horace P. Janes and Frank Johnson were appointed administrators upon his estate, in California, on the 26th of October, 1853.

Before Van Pelt's death he had advanced to Vanderbilt to build said boat the sum of $20.000 dollars (Record, p. 64), but finding the building of the boat likely to be more expensive than he expected, and being in feeble health, he invited Chenery to join him in her construction.

"To the fourth cross-interrogatory he saith: Van Pelt was at Sonoma, sick, and sent for deponent. He then told deponent he was building this boat, and that with other business, in consequence of his health, he would be unable to attend to it, and would not have money to complete it as he had anticipated, and desired deponent to take an interest in it, and take the agency of the whole matter; deponent consented or agreed to take the interest and the control of it. This is the substance of what was said at said interview."

Depos. of Chenery, Ans. 4, Record, p. 66.

The boat was completed by means of drafts drawn in New York, which were paid in San Francisco by Chenery and the estate of Van Pelt, according to the proportion of their interest in said boat.

At the time of Van Pelt's death (September 29, 1853), the boat was in frame, and not yet planked, and only $14,208 had been then expended in her construction, and of this, seven-twentieths had been paid by Chenery and Jessup, others whom he had associated with him, and the balance by Van Pelt.

Depos. of Vanderbilt, 26 Ans. Record, p. 230.

After the boat was completed, Chenery, who was one of the administrators in California and an owner of seven-twentieths of the boat, gave orders that the boat should be sold in New York. This order was given after consulting the other administrators, all agreeing that the interest of the estate required the sale. He (Chenery) wrote to both Vail and Vanderbilt to sell said boat in New York.

Depos. of Chenery, Ans. 17, Record, p. 67.

In pursuance of the understanding with Van Pelt the boat was built wholly under the direction of Vanderbilt. All the contracts were made in his name, and all the payments were made by him, and when the boat was completed she was delivered to him. The builder's certificate was issued to him, the bill of sale was made to him, and she was enrolled at the Custom House in New York in his name.

See copies of contracts, Record, p. 240, 241, 242.
Builder's certificates, Record, p. 245.
Bill of sale, Record, p. 245.

The boat was completed in May, 1854, and the appellants, through their agent, William Deming, purchased her of Vanderbilt, August 3d, 1854, paying $5,000 at the date of the contract, $15,000 August 23d, and the remainder of the purchase money September 9th, 1854, amounting in the whole to $88,000 in cash, which was her fair and full value, and took from him a bill of sale, dated September 9, 1854, and the said Deming subsequently conveyed her to the appellants.

Depos. of Deming, Ans. 7, 8, 9, Record, p. 189.
Depos. of Deming, Ans. 26, Record, p. 191.
Depos. of Todd, Ans. 18, 19, Record, p. 195.
Depos. of Vanderbilt, Ans. 44, 49, Record, p. 231.
Depos. of Vail, Ans. 31, Record, p. 209.

All of this money, except $5,000 retained by Vail to pay a mortgage due him from Van Pelt and Chenery, jointly, and

a small portion to pay off claims against the boat, was remitted to Chenery, in California, one of the administrators, and also an owner of seven-twentieths of the boat, — a part in the month of September, 1854, and a part in October, 1854, — and was received by Chenery; and the other administrators were notified by Chenery of its reception.

Depos. of Vail, Ans. 24, Record, p. 209.
Depos. of Chenery, Ans. 34 and 35, pp. 68 and 69.

Some difference arose between the distributees of the estate and Chenery about a promise of Chenery which the distributees asserted he had made to make up the difference between the price and the cost, and to allow 3 per cent. interest on all advances, — and before its adjustment Chenery became insolvent and failed to pay over to the distributees their proportion.

Depos. of Chenery, Ans. 42 and 45, Record, p. 69.

Thereupon, Marshall A. Mathes, who married a sister of John Van Pelt, and in right of his wife was one of the heirs of the estate, came to New York from California, September 8th, 1854, and took out ancillary letters of administration in that State, and brought suits against both Vail and Vanderbilt, with one count for money advanced by Van Pelt for the construction of the boat, and another count for the ~~proceeds of the sale~~ conversion of the boat.

See copies of proceedings in courts of New York, in amended Record, p.
Depos. of Vail, Ans. 27, Record, p. 209.
Depos. of Vanderbilt, Ans. 45, 46, 47, p. 231.

This same Mathes afterwards came to Boston, the middle of September, 1854, and took out another letter of administration in the name of his mother, Eleanor Van Pelt, and, in her name, demanded of the agent of the appellants possession of the Adelaide, and brought a suit in Admiralty to try the title and for possession of the boat.

Depos. of Mathes, Ans. to 18th int., Record, p. 122.

October 26th, 1855, another ancillary letter of administration was taken out in the State of Maine, by the complainant, and this bill was filed November 8th, 1855.

It does not appear that there is a single creditor or distributee of the estate of Van Pelt resident in the State of Maine.

The defendants demurred to the bill, and it was decided on the demurrer, —

(1.) That upon the case as stated in the bill there was no fraud upon the registry laws of the United States.

(2.) That the defendants took the *legal* title to the boat, and if with notice affected with a trust.

Charles Scudder *v.* Calais Steamboat Co.
Law Rep. January, 1858, p. 498.

Thereupon the complainant amended his bill, and testimony was taken by both parties, and upon the bill, answer and proofs, it was held by Mr. Justice Clifford —

(1.) That respondents took no title from Vanderbilt.

(2.) If they took title, that they took it affected with a trust.

(3.) That the respondents had notice of the trust.

(4.) That although respondents took no title from Vanderbilt, that complainant had no remedy at law, and the Court ordered that the respondents should convey $\frac{13}{20}$ of the vessel to the complainant, and pay to him $\frac{13}{20}$ of the earnings of the boat, and the cause was sent to a master to report the amount of $\frac{13}{20}$ of the earnings. The master reported the amount, and added thereto annual interest, to which allowance of interest the respondents excepted. The master's report was accepted, and a decree entered for a conveyance of $\frac{13}{20}$ of the vessel, and for the payment of $\frac{13}{20}$ of the net profits of the vessel with annual interest, — from which decree the appellant appeals.

I. The decision upon the demurrer was merely upon the case made by the bill, there being no proofs in the case.

II. The defendants purchased the steamboat of William W. Vanderbilt, and paid her fair and full value. This is the highest evidence of the good faith of the purchase.

"The price paid was a fair price for the steamer."

Depos. of Deming, Ans. 26, Rec. p. 191.

"The price was eighty-eight thousand dollars."

The price was a fair price for said steamer.

Depos. of Todd, 18 and 19 Ans. Rec. p. 195.

"I consider that the price I got for her was her full value."

"William Deming bought the boat in good faith, and paid full value for her."

Depos. of Vanderbilt, 44 and 49 Ans. Rec. p. 231.

"The boat was sold in good faith by us, and bought in good faith. Her value was paid for in cash. She was sold for her value, and all proceedings on our part were had without any reference to any unfair or unjust proceedings in the premises."

Depos. of Vail, Ans. 31, Rec. p. 209.

The complainants have made no attempt to prove the contrary.

III. The defendants purchased of one having possession of the boat and the record title. Vanderbilt had the builder's certificate and the bill of sale from the builder. All the contracts for the construction of the boat were made by Vanderbilt in his own name.

Testimony of Vanderbilt, pp. 229, 230, Ans 4th, 4, 7, 20, 21, 22.
Builder's Certificate, p. 245.
Builder's Bill of Sale, p. 245.
Copies of Contracts, 1, 2, 3, 4, 5, pp. 240, 241, 242, 243, 244.

Vanderbilt thus took the record legal title pursuant to the express understanding from his employers, who were not to be known in the transaction; the intent being that the boat was to be his to all intents and purposes until his arrival in California, when Vanderbilt was to give a bill of sale of her to her respective owners, and *this was to be kept secret.*

The testimony shows no change, either by Van Pelt in his lifetime, or by his representatives after his death, of the arrangements, *so far as keeping such interest secret was concerned.* Van Pelt died September 29, 1853, and one of the last acts of his life was to direct, by a letter to Vanderbilt, of September 1, how the title of the boat should be held; and when he sent Vail, his agent, to New York, he instructed him not to vest any part of the title in his name. Indeed, the bill itself does not allege that the title to any part of the boat was at any time to be held by Van Pelt.

W. No. 9.

San Francisco, Sept. 1, 1853.

W. W. Vanderbilt, Esq.

Dear Sir: — I wish you to proceed with the boat as fast as possible; that is, the hull, engine and joiner's work. Do not purchase anything for the boat. Capt. Vail will start for New York by the steamer of the 15th, and I will buy her outfit with your assistance. Don't be too extravagant in the finish. We want no extras. I send by this mail a letter of credit for $10,000. Capt. Vail, on his arrival, will explain the arrangement for the balance of the money needed. I wish the bill of sale to be made for D. P. Vail $\frac{10}{20}$, R. Chenery $\frac{4}{20}$, R. M. Jessup $\frac{3}{20}$, W. W. Vanderbilt $\frac{2}{20}$, and Frank Johnson $\frac{1}{20}$. I wish you to have the boat painted with three coats and plain, no fancy work.

And again, by a letter so late as Sept. 13, 1853, from his clerk, Payson, to Vanderbilt, Record, pp. 149–50, he writes:

"You are not to know that he has any interest in the boat, and you must be more particular in talking and writing about her and her destination."

Vanderbilt enrolled the boat wholly in his own name, as he was originally authorized by Van Pelt to do, and not in the name of Chenery, Jessup, Vail, Johnson and himself, as subsequently instructed to do, because, being ordered by Chenery to sell the boat, he could not otherwise have conveyed a title to the purchaser.

"To the fourth int. he saith: He did state to me in the month of September, 1853, that Wm. W. Vanderbilt was building a steamboat in New York, as I understood him, with the understanding that his name was not to appear in the contract or anything appertaining to the boat. He did not make any statement to me about the contract, or how she was to be fitted. There was something said about in whose name her papers were to be taken out. Her papers were to be taken out in my name, D. P. Vail, as owner of $\frac{10}{20}$ths, Richard Chenery $\frac{4}{20}$ths, R. M. Jessup $\frac{3}{20}$ths, Frank Johnson $\frac{1}{20}$th, and W. W. Vanderbilt $\frac{2}{20}$ths. At that time I agreed to come on to New York and take charge of the vessel and take her to Calfornia."

"To the ninth int. he saith: I have answered as fully as I can in my answer to the fourth interrogatory, — as I there said Mr. Van Pelt was anxious that his name should not appear in the contract, or anything appertaining to the boat, and he urged upon me the necessity of keeping it secret, and not let it be known that he had anything whatever to do with the boat. I cannot state why any part should be enrolled in my name, except that he desired it, and would not state to me why it was so."

Depos. of Vail, 4 and 9 Ans. Rec. p. 207.

It being expressly agreed that Vanderbilt should be the holder of the legal title, and the apparent owner, and should

enrol the boat in his own name as owner, taking the necessary oath that he was owner, it cannot be maintained that, according to the original understanding between himself and Van Pelt, any legal title was intended to be vested in anybody but himself; nor did the subsequent instructions contemplate that any legal title was to be vested in Van Pelt.

The appellees insist that, when a contract is made to build a ship, the title to the structure vests as the materials are annexed to it. This is not the law of New York, the *locus rei-sitæ*, Andrews *v.* Durant, 1 Kernan, 35; but, if it were otherwise, we would observe *that it vests in the person with whom the contract to build the ship is made*, and as that person in this case was *Vanderbilt*, the title, in accordance with this doctrine, from stage to stage, vested *in him*, so that it is not perceived how the appellees can avail themselves of this supposed rule of law. There is no case which shows, or tends to show, that the title vests in a third person, simply because he has agreed to supply a part of the money to be expended by the person in whose name the contract is made, under an agreement that he and various others are ultimately to be interested in the vessel.

Another suggestion is, that in this case it was *expressly agreed* between the parties that the title should vest and remain in Vanderbilt, and this was a matter over which the parties had entire control, and no change was made by which any of it was to be vested in Van Pelt. They could make what agreement they pleased in the matter, and the title would follow the agreement.

Vanderbilt therefore had the *legal* title to the boat, and that title he conveyed to the appellants.

Whatever equitable interest may have existed in Van Pelt's administrators and in Chenery by reason of Van Pelt and Chenery and Van Pelt's administrators having employed Vanderbilt and advanced funds to him, was extinguished by this sale and conveyance from Vanderbilt to the appellants.

(1.) The respondents purchased for a full price, and paid the full value of the boat.

Depo. of Deming, Ans. 26, Record, p. 191.
Depo. of Todd, 18 and 19 Ans. Record, p. 195.
Depo. of Vanderbilt, 44 and 49 Ans. Record, p. 231.
Depo. of Vail, Ans. 31, Record, p. 209.

(2.) They parted with their money on the faith of the title.

Depo. of Deming, Ans. 29, and 6th Cross, Record, p. 191.
Depo. of Todd, Ans. 20, Record, p. 195.

(3.) Notice of the complainants' title is explicitly denied in the answer, and, though on information and belief only, (which is all the Corporation *could* do), is entitled to much weight.

Carpenter *v.* Prov. Wash. Ins. Co., 4 How. 185.

(4.) The agents of the Corporation who made the purchase, paid the purchase money and took the title, have been examined, and deny notice.

Depo. of Deming, Ans. 27, 29, Record, p. 191.
Depo. of Todd, Ans. 21, Record, p. 195.

(5.) The complainants insist that these agents had constructive notice; that they were aware that parties in California had some interest in the boat; that Vanderbilt and Vail, with whom they dealt, were acting for others; that they were thus put upon inquiry, and ought to have refused to pay for the property until they had made further inquiry as to the title.

To this it is answered:

1. That no inducement is shown, and none can be imagined, to cause the agents, who were themselves largely interested in the Company as stockholders, to pay away eighty-eight thousand dollars for this steamer, *unless they verily believed* they obtained a good title.

2. That the evidence relied on by the complainants to prove notice, while it has a tendency to show that the respondents' agents were informed that parties in California had an interest in the boat, by reason of having advanced money to build it, at the same time clearly shows, that the strongest assurances were given to the agents by Vanderbilt and Vail, that as builders of the boat and holding the legal title, as well as by instructions from those interested in California, they were authorized to make the sale.

Depos. of Deming, Ans. 14, 15, 16, 17, 18, Record, p. 190.
Depos. of Todd, Ans. 10, 11, 12, 17, 20, Record, p. 194–5.
Depos. of Vanderbilt, Ans. 39, 40, Record, p. 231.
Depos. of Vail, Ans. 16, 17, 19, Record, p. 208.

Van Pelt having required Vanderbilt to keep his interest secret, *and so to manage the affairs of the boat that he should not appear to have any interest in it*, is he or are his representatives, in a condition to complain of want of due diligence on the part of these persons in failing to make inquiries? They having trusted Vanderbilt and having bound him to secrecy, and this obligation of secrecy not having been revoked or changed, can the respondents be made to suffer because their agents trusted to the representations of Vanderbilt?

Jones *v.* Smith, 1 Hare, 43.
Perry *v.* Holl, ~~2 Giffards Ch. R. 138.~~ 2 Dep Leigh & Jones ch 38
S. C. on Appeal, 1 Phil. 244.
Buttrick *v.* Holden, 13 Met. 356.

But the conclusive answer to this part of the complainants' argument is, that Vanderbilt and Vail *were authorized* to sell the boat, and their representations to that effect to the agents of the respondents were substantially true.

It is intimated in the complainants' brief (pp. 34, 35), that the boat, after her purchase by Deming, was hurried away from New York. This is not true; and the only evidence to support this position is the following statement by Mathes

in his deposition (Ans. 17, p. 121):—"On Monday morning early following I *learnt* that the Adelaide had been run away with from New York waters on Sunday morning early, the 10th inst., in a violent gale of wind that prevailed at the time." How he *learnt* this, and from whom, he does not state. The fact was that she left in rough weather, because she had been already greatly delayed in her departure, and she was much wanted on her route, in place of the Admiral, which had been lost, and whose place she was to fill.

"To the fourth he saith: I went there to take command of her, but the reason I altered my last answer is, that we always have a sound pilot to bring the boats round. I expected to fit the Adelaide up, but had no precise knowledge whether I was to come in command of her or not. I expected, if I did come in command, to have a pilot to bring her round. We were detained in New York more than a week longer than I anticipated when I went there, on account of having more to do to the boat than I expected."

"To the fifth he saith: I expected to leave on Thursday, as near as I recollect; but the mechanics did not get through until late on Saturday afternoon. When I first went on, I expected to leave as early as the Saturday before. The steamboat's regular pilot was there on Thursday, I think, to come on, but we couldn't get off."

"To the sixth he saith: They were in haste to have her come, because the Admiral had just been lost, and there was only one boat on their route."

"To the seventh he saith: I think she had been. I think she was advertised to be on the route a week before she was on it. I am not positive about this, but I think it was so."

"To the eighth he saith: She left there on Sunday morning. On Saturday night there was a heavy easterly storm. When we left the wind was still from the eastward, but more moderate. The weather was not very bad then to come

down the Sound. We left when we did, because the boat was ready, and we were in a hurry to get here."

Depos. of Winchester, Ans. 4,5,6,7, 8, Record, pp. 258, 259.

"To the 51st cross-int. he saith: There was not. The boat was some 10 days behind the time I agreed to deliver her. She did not leave New York on the same day the bill of sale was signed. She left on Sunday morning, between 7 and 9 o'clock. The wind was to the eastward and raining. I took her out of the dock, and did not consider there was any risk or hazard at the time. The wind was blowing fresh, but not a gale. She stopped on her passage about an hour or so after we started. As she was new, Mr. Deming desired me to wait until the weather moderated. We were some 16 or 18 miles from New York at the time. There were no measures taken to my knowledge by any one to have her detained. I did not know that any of the heirs or administrators were here."

Depos. of Vanderbilt, Ans. 57, Record, p. 238.

IV. If the administrators, as such, could acquire title to personal property in New York, they could convey such property. If they had authority, *as administrators*, to make advances and complete this boat in New York, had they not authority to dispose of what they had built? Is their action to be affirmed in part and disaffirmed in part?

The sale of the boat was ordered by Chenery, *one of the administrators*, with the knowledge of the others, and the other administrators and heirs were informed by Chenery of the sale.

"To the eleventh cross-interrogatory he saith: He did receive letters from said Vanderbilt and Vail in regard to said boat, after the death of the said Van Pelt, and up to the time of and after the sale of the said boat, and declines annexing the originals or copies of any letters from Vander-

bilt and Vail, for reasons given in answer to the tenth cross-interrogatory."

"To the twelfth cross-interrogatory he saith: He communicated the contents of said letters to his administrators."

"To the thirteenth cross-interrogatory he saith: The other administrators knew of said boat being finished in New York, and of the proceedings of witness in regard to her, and nothing was kept secret or withheld from the other administrators. This deponent does not recollect of any objection by his co-administrators as to his proceedings, or any measures taken by deponent in regard to said boat."

"To the fourteenth cross-interrogatory he saith: It was intended after the deponent as administrator and after he commenced paying drafts, said boat when completed should be sent to California. Such intention was changed in the spring of 1854, and was known to the other administrators. One reason for such change was the want of money required to complete her and pay the expenses of the voyage from New York to California, and the remaining reason was that deponent esteemed it a bad speculation, and the boat would not pay after she arrived here."

"To the fifteenth cross-interrogatory he saith: Yes, and the reason was want of funds to finish her, and it was thought she would not pay after her arrival."

"To the sixteenth cross-interrogatory he saith: He did converse with the other administrators in regard to selling said boat in New York, and did not keep it secret from them."

"To the seventeenth cross-interrogatory he saith: He wrote to both Vail and Vanderbilt to sell said boat in New York; and deponent declines to annex copies of the letters for the reasons stated in answer to the tenth cross-interrogatory."

Depos. of Chenery, Record, p. 67.

"To the eighteenth cross-interrogatory he saith: The other administrators did know that deponent ordered the sale in New York at the time he did so; they did not object nor concur; thought they had no control over the boat as administrators, but thought it would be expedient for the boat to be sold."

"To the twenty-ninth cross-interrogatory he saith: He cannot say when he first informed the other administrators of the sale, but he did so as soon as he was informed of it himself, and did not conceal it, and exhibited to them the correspondence in regard to the sale."

"To the thirtieth cross-interrogatory he saith: The other administrators neither objected nor approved of the sale. This deponent has no recollection of anything said by them on the subject."

"To the thirty-fifth cross-interrogatory he saith: The other administrators did know that deponent received the proceeds of the sale of said boat, and they were informed of it by deponent at the time said proceeds were received, in October, 1854."

"To the forty-second cross-interrogatory he saith: He had negotiations in regard to disposition of said proceeds with David Van Pelt and Stalham Wing, and such negotiations were not accepted for the reason they desired the original investment, returned with three per cent. interest per month, which deponent declined. Deponent proposed to pay them their proportion, received according to their interest in the boat, and when balance was received, to be divided in the same manner. These were all the negotiations."

Depos. of Chenery, Record, pp. 67, 68, 69.

Even the heirs consented.

"We told him (Chenery) that we would consent to sell the boat in New York, and would execute a bill of sale of the interest of the estate upon receiving the money, according to his proposition, provided the sale was made immediately after the completion of the boat."

Depos. of Wing, 17 Ans. Record, p. 74.

"About the last of August, or first of September, 1854, Mr. Chenery said he had received information from Captain Vail that he had sold the steamboat Adelaide, and asked us to give a bill of sale of her to the purchasers. I told him we would do so when we received the money for her, in accordance with his proposition to us in March last."

Depos. of Wing, 17 Ans. Record, p. 74.

"We told him if Vail could sell, when we got our money we would give a bill of sale."

Depos. of Wing, Ans. 14, Record, p. 75.

"I also consented that they might sell the new boat, Adelaide, in New York, restricted not to come into the waters of California; returning all the money the estate had paid, with 3 per cent. per month interest thereon, until paid back."

Letter of David Van Pelt to Vanderbilt, dated May 29, 1854. No. 2. Record, p. 154.

Wing and David Van Pelt were both distributees of the estate, and agents also for all the other heirs.

See Powers of Atty. by Distributees to Van Pelt and Wing.
Record, pages 77, 78, 79, 80, 81, 82.

"David Van Pelt and Mr. Stalham Wing represented said heirs in California."

Depos. of Chenery, 39 Ans. Record, p. 69.

One of two or more administrators may make a valid sale

of the personal estate, and give a valid discharge, without the concurrence of the others.

1 Lomax on Executors, pp. 545, 546.
Murray *v.* Blatchford, 1 Wend. 583.
Bogest *v.* Hertell, 4 Hill, 492, 503.

V. The *proceeds of the sale* were remitted to, and received and accepted by, Chenery, *one of the administrators* in California, and with the knowledge of the others, *and before their discharge as administrators.*

See Decree of Judge of Probate, Record, p. 282.
Compiled Laws of California, p. 418, § 279.

"Said proceeds were received in Oct., 1854."

Chenery, Depos. 35 Ans. Record, p. 69.

"The first remittance was, I think, 20th Sept., 1854 — amount, $30,000; and I think another remittance on the 5th of Oct., of same year, of $40,000."

Depos. of Vail, 24 Ans. Record, p. 209.

To the thirty-fifth cross-interrog. he saith: "The other administrators did know that deponent received the proceeds of the sale of said boat, and they were informed of it by deponent at the time said proceeds were received in Oct., 1854."

Depos. of Chenery, 35 Cross-Interrog. Record, p. 69.

The pretended discharge of said administrators by the Probate Court at San Francisco (Record, p. 281, 282) shows that they were not to be discharged without paying over to the distributees all the moneys, credits, property, and estate in the possession of said administrators, nor without filing a receipt from the distributees, acknowledging such payment, one of whom being accountable to the distributees for the proceeds of the sale of this boat, actually received before

the date of this decree of the Probate Court, and not having filed any such receipt by the distributees, his accountability to the distributees, as administrator, still exists undischarged, and if Chenery be insolvent, the distributees have a remedy upon his bond.

If Chenery's receipt of the money was not sufficient to confirm the sale as against him, as administrator of a deceased owner, how can it be sufficient to confirm the sale against him as a living owner? The fact that he was but one of several administrators is unimportant; because one administrator, like one executor, possesses the entire power of representing the decedent, so that if, in accordance with the averment in the bill, Chenery has ratified the sale, he has ratified it by receiving the proceeds of the sale; and he received the part of the proceeds which belonged to the estate, as well as the part of the proceeds which belonged to himself, and so ratified for the estate as well as for himself; and if he has not ratified for himself, as the bill alleges he has, he is an indispensable party, without whom the bill cannot be sustained.

See Amendment to Bill, Record, p. 12.
Shields and al. *v.* Barrow, 17 How. 130.
Testimony of Vail, p. 209, Ans. 24.
Chenery, 68 Ans. p. 34, 35.

VI. If Chenery could be considered as a foreign administrator in reference to the interest which Van Pelt had in this boat, *still a payment to a foreign administrator is valid as against an administrator subsequently appointed.*

Hutchins *v.* State Bank, 12 Met. 421.
Fletcher *v.* Sanders, 7 Dana, 345–349.
Story Confl. of Law, § 515, 3d ed.
Trecothick *v.* Austin, 4 Mason, 16, 17, 33.
Williams *v.* Storrs, 6 Johns. ch. 353.
Doolittle *v.* Lewis, 7 " " 45.

Vroom *v.* Van Horn, 10 Paige, ch. 549, 556, 557.
Brown *v.* same, 1 Barb. ch. 189, 214.
1 Lomax on Ex'rs, 556.
2 Kent's Com. 432.

VII. But if the legal title to $\frac{13}{20}$ of the steamer, at the time of her completion, was in Van Pelt's representatives, Chenery's instruction to Vanderbilt and Vail to sell her in New York while he was administrator, and a sale in conformity with those instructions, and the payment of the purchase money to his agents there, and its subsequent receipt by him, passed that legal title to the purchasers. The fact that he supposed himself acting as agent, and not as administrator, cannot affect third persons. As administrator, he had power to sell. As administrator, he had power to receive the purchase-money; and when he ordered the sale he must be taken to have used whatever lawful authority he had to give such an order. When he received the purchase-money, he must be taken to have received it in that capacity in which he had a right to receive it.

It is settled law, that where an act is done, which would be valid if taken to be the execution of a power, but invalid otherwise, it will be deemed by a court of equity to have been done *in the execution of the power, although it is expressly declared* to have been done by virtue of some title or right distinct from and not consistent with the power.

Sir Edward Sugden thus states the rule: "If the intention to pass the property can be collected, it will pass under the power, although the donee supposed it would work by force of his own interest." 1 Sug. Powers, 440; and see his statement of the case of Wade *v.* Paget, p. 438, and the other cases stated by him: see pages 436–7.

And this accords with the common law, which attributes

an act to a lawful authority, where such authority existed and was sufficient to warrant the act.

Goodtitle *v.* Newman, 3 Wils. 516.

So here, Chenery may have supposed that, as part owner and agent, he had a right to order a sale, and that as administrator he had not a power to do so. But he intended to sell, and have the property pass: and in favor of a purchaser, the sale will be treated by a court of equity as validated by his power as administrator. A court of equity will relieve a purchaser in case of a defective execution of a power. *A fortiori* will it hold such an execution as this effectual.

VIII. *Chenery, as administrator, appointed in California, the domicil of the intestate, and as part owner, had power to order a sale of the steamer in New York, and the title made by the sale will not be decreed by a court of equity to be void upon the facts of this case.*

I. What were the relations of Chenery, *in his capacity of administrator*, to this steamer?

(1.) Vanderbilt, having made all the contracts for building and equipping the steamer in his own name, but under the authority of Van Pelt, had a valid claim on Van Pelt in his lifetime, and on his administrators, after his decease, for the amounts necessary to pay the contractors.

(2.) The contractors themselves, on discovering that Vanderbilt had acted for Van Pelt in making the contracts, could have had direct recourse against the administrators for the sums necessary to pay them.

(3.) The payments made by the administrators ($48,000) on account of the steamer were, therefore, made in discharge of obligations legally incumbent on them.

(4.) The intestate died September 29th, 1853. Though most of the contracts for building the steamer had then been made by Vanderbilt, the steamer was then but begun. Subsequent to this time the construction was continued, and the administrators paid something over $48,000 on account of the part which they were liable for.

Upon these facts it is respectfully submitted: —

That, under the laws of New York, this sale was so far valid and effectual, that a court of equity will not interpose to declare the sale to be void, at the instance of an ancillary administrator subsequently appointed in the State of Maine.

The power of a principal administrator in California to order the sale of an interest in a vessel in New York depends on the laws of the State of New York.

No administration having been taken in that State, a foreign administrator might lawfully reduce to possession and sell a chattel which was in that State at the death of the testator.

Vroom *v.* Van Horn, 10 Paige, 550.
Brown *v.* Brown, 1 Barbour Ch. Rep. 214.

A fortiori in case of a vessel.

The Boston Blatch. & How. Rep. 309.

But in this case the chattel was created after the death of the intestate, under the authority, and by means of the payments made by the administrators in California; and when the vessel was completed and delivered, the interest of the estate, whether legal or equitable, became vested in the administrators in California, *not by force of the law of California*, but *as purchasers*, under the contracts which they performed through Vanderbilt.

The ancillary administrator, subsequently appointed in the State of New York, ~~so far from disaffirming this sale, brought an action against Vanderbilt and Vail to recover the price.~~ brought his action against Vail & Vanderbilt, for the conversion of the boat

An ancillary administrator, subsequently appointed in the State of Maine, cannot disaffirm this sale so made in New York, and have the aid of a court of equity to set it aside.

IX. Vanderbilt did not hold the title to the boat upon any valid trust, because, by the arrangement with Van Pelt, his interest was to be kept secret to prevent its being attached by creditors of Van Pelt in New York. This arrangement was illegal, and a court of equity will not enforce such a trust. Having clothed Vanderbilt with the title to the boat under such arrangement, Van Pelt and his representatives are estopped from setting up any claim to the vessel.

To the 18th interrogatory he saith: "Van Pelt told me that there were parties in New York who had got judgments against him and others, and he made me pledge myself to him that I would not at any time reveal that he had any interest in the boat."

Depos. of Vanderbilt, 18 Ans. Record, p. 230.

To the 4th cross-int. he saith: "There was an arrangement that she was to be registered in my name, and it was made in California. There were two reasons which he told me: One was that there were parties in New York that held judgments against him and others. The other was that he did not want some of the parties that he was in connection with to know that he was building another boat."

Depos. of Vanderbilt, 4 cross. Record, p. 232.
Depos. of Vanderbilt, 5 cross. Record, p. 253.

He (Van Pelt) says also, "Write that you are not to know that he has any interest in the boat, and that you must be

more particular in talking and writing about her and her destination."

Letter of Payson to Vanderbilt, Sept. 13, 1853. Record, p. 149.
Hill on Trustees, p. 45.
Cushwa *v.* Cushwa, 5 Maryland, 44.
Pepper *v.* Haight, 20 Barb. 429.
White *v.* Hunter, 3 Foster, 128.
Carroll *v.* Boston Ins. Co., 8 Mass. 515.
Dadmun Man. Co. *v.* Worcester Ins. Co., 11 Met. 429.
Broughton *v.* same, 4 Richardson (s. c. Law), 491.
James *v.* Bird, 8 Leigh, 510.
Roane *v.* Vidal, 4 Munf. 187.
Thomas *v.* Soper, 5 Munf. 29.
Stewart *v.* Rearney, 6 Watts, 453.
Buckler *v.* Gloninger, 2 Watts, 226.
Osborne *v.* Morse, 7 Johns, 161.
Jackson *v.* Dutton, 3 Harr. 98.
Hunter *v.* Marlboro', 2 W. & Minot, 168.
Murphy *v.* Herbert, 16 Penn. 50.

X. A Court of Admiralty is always open by a suit in behalf of the majority owner to try the title and obtain possession and control, upon such terms and conditions as the maritime law of the country has deemed most wise and appropriate, and which a Court of Equity should not assume to interfere with; and it may be appropriately asked how the interference of a Court of Equity, even after a decree, is substantially to relieve a majority owner from this necessity of applying to a Court of Admiralty. Suppose this Court should determine that these appellants are entitled to $\frac{13}{20}$ of the ship; will this Court by its decree turn out of possession the tenant in common who owns $\frac{7}{20}$, or will it only put the owner of $\frac{13}{20}$ into joint possession with him; and when they are thus in joint possession, will it not still be necessary for one or the other to apply to a

Court of Admiralty to obtain its sanction for the actual employment of the ship? And why not apply to a Court of Admiralty before prosecuting the suit in equity, since a Court of Admiralty is just as capable of trying the legal title as a preliminary to its decree for the employment of the ship as a Court of Equity is? Such a suit was in fact brought by one of the ancillary administrators.

Steamboat Orleans *v.* Phœbus, 11 Peters, 175.

XI. The suits brought by the administrator in New York against Vanderbilt and Vail to recover the moneys advanced to build the boat, and for its conversion, are wholly inconsistent with any title by an ancillary administrator in Maine to sustain this bill. (See return to certiorari in Suplemental Record, pp. 2–10.)

XII. To sustain the jurisdiction of the Court in Equity, it must be, and is, assumed that there has been *no conversion* by the sale of the steamer, and by taking possession and employing her by the Steamboat Company.

It is the case of one tenant in common taking possession of and employing a vessel at his own cost and risk; and no case can be found in which a tenant in common has been held liable to account for profits made in such employment. The common law allows either tenant in common of a ship, who is in possession of it, *to employ it on his own account and risk, and at his own expense.*

The part owner, not in possession, is not liable for repairs and supplies, nor for any losses arising out of the adventure.

Nor, on the other hand, has he any claim to share in its profits.

Abbot on Shipping, 100–104. (Marginal p.g.)
Story on Partnership, § 427.
Horn *v.* Gilpie. Ambler, p. 255.

The case of a steamship employed in the business of carrying passengers and freight at the expense and risk of one tenant in common, who embarks in the business his own capital and skill, while the other tenant in common makes no offer to participate in the business, is wholly unlike the receipt of rents from real estate; and, as is shown by the authorities above cited, is governed by its own rules and principles, which, while they exempt the owner, who is out of possession, from all liabilities and risks of the business, prevent him from participating in its profits.

XIII. The appellees are not entitled to recover any interest *a fortiori* annual interest on the net earnings of the boat.

XIV. The argument thus far has proceeded upon the assumption made by the appellees that Van Pelt was entitled to an interest in the steamer of $\frac{13}{20}$; but in truth he was entitled only to $\frac{10}{20}$.

Letter of Van Pelt, Sept. 1, 1853. (p. 148.)

This shows that Van Pelt had made such arrangements that the ownership was to be as follows:

D. P. Vail (for Van Pelt)	$\frac{10}{20}$=10
R. Chenery	$\frac{4}{20}$= 4
R. M. Jessup	$\frac{3}{20}$= 3
W. W. Vanderbilt	$\frac{2}{20}$= 2
Frank Johnson	$\frac{1}{20}$= 1
	20

The appellees say Chenery in some way acquired Jessup's $\frac{3}{20}$, so as to be interested to the extent of $\frac{7}{20}$.

How did Van Pelt, or his estate, acquire Frank Johnson's $\frac{1}{20}$? There is no evidence that Van Pelt's administrators ever acquired Frank Johnson's $\frac{1}{20}$.

Johnson himself, who is the witness examined for the appellees, says (p. 42, 27 ans.) he had an interest, and had advanced to Van Pelt in his lifetime the money to pay for it, and Van Pelt's letter shows what it was, and (p. 43, 38 ans.) he says he sold his interest to Chenery & Jessup, and states that it was $\frac{1}{20}$ of the steamer.

Chenery (also witness for the appellees) confirms this so far as respects the fact of Johnson's interest, (p. 65, ans. 18,) and shows that Johnson received his part of the proceeds of the sale of the boat (p. 69, ans. 37).

The only difference between these two witnesses is, that Johnson says he sold his $\frac{1}{20}$ to Chenery & Jessup before the proceeds of the sale of the boat were received, while Chenery says he accounted with Johnson for his part of the proceeds of the sale. *Quacuqua via* his interest of $\frac{1}{20}$ existed, and was extinguished, either by a sale to Chenery & Jessup, or by receiving his part of the purchase money.

To this extent the decree, both as it respects the *title* to the boat and its *profits*, is erroneous, and should be reversed.

If Johnson's interest was not in fact extinguished, he was a necessary party, and the bill cannot be maintained.

Neither did the estate of Van Pelt acquire the interest of Vanderbilt in the boat which was $\frac{3}{20}$ = by agreement made with Van Pelt in his lifetime.

Depo. of Vanderbilt, 14 Ans., Record, pp. 229, 230.
" " 3 cross, p. 232.
Depo. of Vail, 4th Ans., Record, p. 207.
Letter of Van Pelt, Sept. 1, 1853. Record, pp. 148, 149.

The complainant in his bill (Record, p. 7,) admits that Vanderbilt did have an interest, and alleges that it was purchased and settled for by Vail. "Previous to July 5th, A. D. 1854, said Vail had settled with Vanderbilt for all his services respecting said boat, and had fully paid him therefor, and also for all money advanced by said Vanderbilt for the purpose of being part owner and interested as part owner therein, and his agency was fully determined and closed." (Extract from bill. Record, p. 7.) But the testimony shews that Vanderbilt never parted with his interest till the boat was sold, (Sept. 9, 1854,) and the value of it and his services were then paid for by Vail *out of the proceeds of the sale of the boat*, so that Vanderbilt thus sold to the respondents his own interest, and received pay for it himself from them.

"He (Vanderbilt) refused to give possession of her until his claims were satisfied against her. His claims were, as he alleged, for money advanced John Van Pelt in part payment for his interest in the boat, and the amount for his services rendered."

Depo. of Vail, 15 Ans., Record, page 212.

"David P. Vail never settled with me for my services respecting said boat until after she was sold, on the 9th day of September, 1854. He agreed to do so but did not. *He settled with me after the 9th of September for my interest in the vessel.* I think this was towards the middle of that month. The sum he paid me for my interest in that vessel was about eleven

thousand dollars. *This was not done until I had paid over to him the whole purchase money.* The eleven thousand dollars, or thereabouts, were paid to me in two or three different sums in or about the early part of September, but I cannot recollect the dates more particularly."

Depo. of Vanderbilt, 17 Ans., Record, p. 249, 250.

It is true that Vanderbilt wrote to David Van Pelt and to Wing (Record, p. 142, 143,) that Vail had settled with him so early as July; but he explains these letters in his deposition, and says, that Vail had only promised to do so, and did not settle with him till the boat was sold.

Depo. of Vanderbilt, 26 Ans., Record, p. 225.
" " 17 " " pp. 249, 250.

This explanation by Vanderbilt is confirmed by a letter of Vail of the same date to Chenery (Record, pp. 150, 151,) shewing that he had not *then* settled with Vanderbilt, and had no money to do so.

Again, it appears from the testimony that Vail retained, by consent, from the proceeds of the sale of the boat, five thousand dollars to pay a mortgage debt due to himself jointly from the estate of Van Pelt & Chenery, and cancelled the mortgage.

"There was a mortgage also of $5,000 which I held against the estate of Van Pelt & Cheney, jointly, which I paid out of the funds in my hands by consent, and the mortgage was cancelled."

Depo. of Vail, Ans. 24th, Record, p. 209.

Now, this appropriation of the proceeds of the sale to the discharge of a debt due from the estate of Van Pelt, with the assent of the representatives of the estate, amounts to an affirmation of the sale.

It appears also from the testimony (Record, p. 212, Depo. of Vail, 15 Ans., and page 249, 250, Depo. of Vanderbilt, 17 Ans.) that Vail paid Vanderbilt for his services for superintending the construction of the boat *from the proceeds of the sale of the boat.* This was a payment and discharge of a debt due Vanderbilt from the estate of Van Pelt of which the estate has had the benefit, and amounts to an affirmance of the sale.

B. R. Curtis
Henry C. Hutchins
Solicitors for
Appellants.

CALAIS STEAMBOAT CO., APPELLANTS,

vs.

CHARLES SCUDDER, ADMINISTRATOR.

Brief of Appellee's Reply.

G. S. GIDEON & Co., Printers,

Supreme Court of the United States.

THE CALAIS STEAMBOAT COMPANY, Appellants,

vs.

CHARLES SCUDDER, Administrator of JOHN VAN PELT.

Brief for the Appellee in reply to Brief of Appellants.

NOTICE OF ABSTRACT.

The drafts were drawn in New York by Vail on Chenery & Johnson, of New York, by instructions from Van Pelt and Chenery while Van Pelt was alive, and from the fund provided by the letter of credit procured by them of Page, Bacon & Co.

Vail, ans. 31 cross, p. 214; Brief of Appellants, p. 3.

Brief of appellants, p. 4, states, orders for sale of boat were given by Chenery, who was one of the administrators in California.

He states that he did not give, as administrator, any order for her sale. Ans. 12, p. 65; Arg. for Appellee, p. 15.

Brief states, p. 4, all the payments were made by Vanderbilt.

Vail, ans. 31 cross, p. 214. "I had instructions to draw on "Chenery & Johnson in New York for all the funds I might "want for the building and finishing said steamer.

G. S. Gideon & Co., Printers.

Brief states, p. 5, all the money except $5,000 was remitted to Chenery in California, one of the administrators.

Chenery, ans. 14, p. 65, says, "He has not, as administra-"tor, received anything from the proceeds of the sale of said "steamer."

"That he did not receive the same until after the settlement of the accounts of the administrators." Ans. 34 cross, p. 69.

He states that he did not account, as administrator, for the proceeds, "for the reason that the administrators had nothing to do with it."

Their accounts were settled Oct. 16, 1854, and they were discharged. Rec., p. 282.

It is stated, before adjustment with distributees, Chenery became insolvent. Brief, p. 5.

The sales were received last of October, 1854, and he did not become insolvent until the month of April or May following. Ans. 45, p. 69.

I. The decision upon the demurrer is not regarded as of importance in these proceedings.

II. The agreement to purchase was made on August 3, 1854, between Todd and Deming on the one part, and Vanderbilt and Vail on the other.

The bill of sale was made by Vanderbilt to Deming on September 9 following, and on that day Vanderbilt and Vail covenanted with Deming respecting the title.

Rec., pp. 18, 19, 24.

III. The original agreement was not that the title should *remain* in Vanderbilt, except for a brief season, until Sept. 1, 1853, when Van Pelt by letter directs him to have the bill of sale of all but 2-20, for which he was to pay, made to others. Letter, pp. 148, 149.

Vanderbilt did not, as stated in Brief, p. 8, take the record legal title pursuant to the express understanding of his employers.

His authority to have the title to the vessel, or of any part of her, conveyed to him was revoked by the letter of Sept. 1, 1853. Instead of its being pursuant to "the express understanding," it was in open violation of his instructions, and without any authority whatever, that he took a bill of sale of her in his own name.

So far as it respects the title at the time when he attempted to acquire it, it was not "expressly agreed that Vanderbilt "should be the holder of the legal title."

If the title to the boat as between Lupton & McDiarmid and Vanderbilt vested in the latter, he being a mere agent of Van Pelt, did not retain it; it passed from him to Van Pelt. Arg. p. 9, pos. 3.

It is asserted in Brief, p. 10, that "by reason of Van Pelt "and Chenery, and *Van Pelt's administrators, having em-"ployed Vanderbilt, and advanced funds to him,*" the equitable title was extinguished.

Van Pelt's administrators never employed Vanderbilt, or advanced funds to him; their testimony proves this.

It is said in Brief, p. 11, that complainants, insist that the agents of the company, had constructive notice. They insist that Deming, to whom the bill of sale was made, had actual notice, and refer to argument, pp. 24 to 36 in proof of it.

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"One is affected with notice of a fact which he might have "learned on such inquiry as all prudent men would naturally "make in a question where they were personally interested."

Montefiore *vs.* Browne, 7 House of Lds. Cas. 269.

It is said in Brief, p. 12, that a conclusive answer to the complainants' argument is, "that Vanderbilt and Vail *were* "*authorised* to sell the boat."

It has already been shewn in argument, that Vanderbilt had no authority whatever, and that the only authority which Vail had was from Chenery, as part owner, and that he did not exercise even that power. Refer to Arg., prop. 4, p. 17, and prop. 6, p. 20.

It is said in Brief, p. 11, "that no inducement is shewn, "*and none can be imagined*, to cause the agents," who were interested as stockholders, to pay $88,000 for this steamer, unless they verily believed they obtained a good title.

If they believed that they obtained a good title, that could have no effect to disprove the testimony to shew that they knew that 13-20 of her was part of Van Pelt's estate.

An inducement may be suggested, if not imagined, that they greatly desired to obtain a new first class steamer to replace one lost, to prepare to defeat and drive off a rival line, to enable them to secure a monopoly of the route, and were willing to incur very great risks to accomplish it, and to take a title which their counsel in New York *could make up.*

IV. Brief asks, p. 14, "If they had authority *as* "*administrators* to make advances, and complete "this boat in New York, had they not authority "to dispose of what they had built?"

The answer is, that they had not built the boat as the question assumes, nor had they made advances to complete her.

Refer to Arg., pp. 2 to 5.

They paid drafts drawn on credits given by Page, Bacon & Co., on a mortgage of property of Van Pelt to redeem that property. Mr. Janes, one of them, then a lawyer, states that they "were paid because they were liabilities against the es-"tate, and a charge or lien upon the property and assets in "the hands of the administrators." Ans. 7, p. 50.

So states Chenery. Ans. 8, p. 64.

It is asserted in Brief "*Even the heirs consented.*"

Wing states, in ans. 17, p. 74, that they would consent to sell upon the terms proposed, "provided the sale was made "immediately after the completion of the boat." This was in March, 1854. The boat, as Vanderbilt states, ans. 4, p. 229, "was completed about May, 1854." There was a failure to comply with the conditions both as to terms and time of sale, and they were forbidden to sell.

The letter of David Pelt referred to shews, that the consent to sell was upon like conditions, both as to terms and time of sale.

The question presented is not whether one of two, or more, administrators could have made a valid sale, but whether in fact they attempted to make any sale, which they all deny.

V. The proceeds of the sale were not received and accepted by Chenery as an administrator.

Chenery so testifies. He states, "He has not, as adminis-"trator, received anything from the proceeds of the sale of "said steamer." Ans. 14, p. 65. And he "did not receive "the same until after the settlement of the accounts of the "administrators." Ans. 34, pp. 68, 69.

He further states that the other administrators did not object to his receiving the proceeds, "because no offer was made "to them; and those representing the heirs declined to receive "said amount because they were dissatisfied with the sale."

Ans. 41, p. 69. S. Wing states, *on 20th Nov.*, 1854, Chenery sent a note informing that he had received a portion of the proceeds of her sale. Ans. 17, p. 76.

The administrators were discharged from their trust as to all proceedings, except that of paying to the distributees and others the amounts due to them by their accounts then settled. Rec., p. 282.

Brief, p. 19, asks: "If Chenery's receipt of the money was "not sufficient to confirm the same as against him as adminis- "trator of a deceased owner, how can it be sufficient to confirm "the sale against him as a living owner?"

"And if he has not ratified for himself" * * * "he is an indispensable party, without whom the bill cannot be sustained."

What is meant by the sale not being or being confirmed or "ratified for himself" * * "as a living owner?" He ordered the sale which was made by full authority from him as an owner of 7-20, and it required no ratification or confirmation.

VI. If payment *"to a foreign administrator be valid,"* there has not in this case been any payment made to a foreign administrator.

Chenery states "He has not as Administrator received any- "thing from the proceeds of the sale of said steamer." Ans. 14, p. 65.

VII. It is stated in Brief, p. 20, "the fact that "he supposed himself acting as agent, and not as "administrator, cannot affect third persons." The position seems to be that a person who may act

in two capacities, and who acts in one, and not in the other, may by law be considered as having acted in that capacity in which he did not act.

The authorites cited are not considered as establishing any such position. They only show that when there was *an intention to pass property* by virtue of a power it would pass by virtue of it, although the person having the power might suppose it would pass "by force of his own interest."

In this case Chenery *did not intend* to have the property pass by virtue of his capacity as administrator.

The sale of the boat was not ordered by Chenery as administrator. He so testifies. Ans. 12., p. 65. Arg., p. 15.

VIII. The position (3) in Brief, p. 21, is, that "the payments made by the administrators "(48,000) on account of the steamer were there- "fore made in discharge of obligations legally in- "cumbent on them."

These payments cannot properly be said to have been made "on account of the steamer" in the sense of having been made to build her. They were made to redeem property mortgaged by Van Pelt when alive to procure a credit from which to finish her.

They as administrators performed no other acts to acquire any interests in her.

And if by that they acquired any interest in her they have never disposed of that interest. They have been discharged, and that interest by law has become vested in the appellee.

It is said, Brief, p. 22, that under the laws of New York the sale *was so far* valid and effectual that a court of equity will not interpose to declare it void at the instance of an ancillary administrator. The sale was valid or invalid. Not partly valid by the laws of New York and partly invalid.

On page 10 of Brief, when speaking of the title as becoming vested in the person for whom a vessel is built, it is said "this "is not the law of New York, the *locus reisitae*." This is not admitted. If it were the title to a vessel is not to be determined by the law of any particular State, but by the mercantile law, unless controlled by provisions of statutes.

IX. It is true that the interest of Van Pelt in the boat was to be kept secret until her arrival in California, because he did not wish those concerned in the navigation of the river Sacramento to know that he was building a superior boat.

Vanderbilt states that there was another reason for it: "that "there were parties in New York that held judgments against "him and others." This statement is not entitled to credit.

Chenery is asked why Van Pelt desired it to be kept secret; and he answers, "for the reason it might interfere with his "then present business," ans. 11, p. 64; and that "he does "not know that Van Pelt was indebted in New York, and no "such reason was given for the keeping secret the building of "said boat." Ans. to 1 cross, p. 66. His testimony is entitled to much greater confidence than that of Vanderbilt.

There is no proof of any such indebtedness. On the contrary it is disproved. Chenery, as one of his administrators, would have come to the knowledge of it if it had existed; and he states that he had no such knowledge. The accounts of the administrators are presented in detail, and there is not found any payment of such a debt. pp. 266 to 276.

It appears from these, and from other testimony, that Van Pelt was at all times a man of large property, and that he left a large estate.

No fraud upon his creditors could have been intended, for there is no proof of their existence in New York. Arg., p. 39.

X. The position presented seems to be that a court of admiralty affords an appropriate and adequate remedy. If this was a mere question of possession between tenants in common, it may be admitted that the remedy would be adequate by a libel in such a court. But no contest respecting possession of the boat is here presented. The appellee claims a conveyance of the title to 13-20, and to that proportion of the earnings of the boat. That title is denied. It is alleged to to have been obtained by fraud, and to be held in trust. The jurisdiction of a court of equity of frauds and trusts, and to compel an account of earnings, presents an answer to the question respecting the head of equity jurisdiction.

A question is asked: "Will the court by its decree turn out "of possession the tenant in common who owns 7-20?" The court is not called upon by the bill to do so. When the appellee has obtained a conveyance of 13-20 a question respecting possession might be presented, not before.

An admiralty court has no jurisdiction to take an account of the earnings of a vessel. In the case of the steamboat Orleans *vs.* Phœbus cited, the opinion states: "In the first place

"the admiralty has no jurisdiction at all in matters of account "between part owners." 11 Peters, p. 182.

The admiralty suit was not prosecuted. There is no proof that it was.

XI. It is insisted that the suits commenced in New York against Vanderbilt and Vail "are "wholly inconsistent with any title by an an- "cillary administrator in Maine."

The facts disclosed by the record are, that Marshall A. Mathis was appointed on September 15, 1854, "collector," not administrator, to collect and receive the personal estate and debts of Van Pelt in that State. p. 129, doc. E. Administration of property in that State was granted to him on Nov. 6 following. On Oct. 7, 1854, a suit was commenced by him as collector against Vail, as he states, p. 180. He also states: "I have been sued by M. A. Mathis in the supreme court in "New York city, in 1854, for $70,000, and that suit is now "pending." Ans. 27, p. 209.

Vanderbilt states that Mathis "commenced a suit against "me to recover a part of the proceeds of said sale. It is in the "supreme court of this city, commenced, I think, in Septem- "ber, 1854, and the suit is still pending." Ans. 47, p. 231.

Mathis states: "I did not as administrator commence a suit "against Willim W. Vanderbilt and David P. Vail for the "recovery of the proceeds of the sale of the steamer Adelaide "to William Deming, but I did commence suits against said "Vail and Vanderbilt to make them account for the money "intrusted to them by John Van Pelt and his estate;" that they are pending, one commenced Sept. 27, and the other Oct. 7, 1854. Ans. 4, p. 124.

Upon a suggestion of a diminution of the record certain papers have been presented by a return of the clerk of the circuit court, purporting to be copies of the complaints in those suits.

These papers do not constitute any part of the record presented to this court by the writ of error.

It appears by the record that "the testimony taken in said "cause is published pursuant to the order of court" on the 7th of February, 1859; and that the cause was fully heard on the 16th of June following, p. 25. At the close of this hearing these papers were first presented to the presiding judge. They constituted no part of the testimony, or of the exhibits filed; and they cannot be taken into consideration by this court.

They were never filed in the case, and never came to the hands of the clerk till May 20, 1862. Sup. Rec., p. 13.

If they could be considered they do not show an affirmation of the sale, but a disaffirmance of it. The first two counts in the complaints call for an account of the moneys received for building the steamer. The gravamen of the third count in each is, "that defendant converted the said steamboat, her "tackle, apparel, and furniture to his own use," and that he undertook to pay therefor in one case $70,000, and in the other $40,000.

These are but counts in trover, alleging a wrongful claim and dominion of the steamer.

If these papers are excluded the case on this point rests only on the testimony of Vanderbilt that he was sued "to re- "cover a part of the proceeds of said sale." That statement is not legal testimony. It is an attempt to prove by oral testimony the contents of a written document, which is also a matter of record.

If it could be received as testimony it is expressly contradicted by Mathis, who has a better knowledge and is more worthy of credit.

If suits were pending, commenced by a representative of

Van Pelt *ad colligendum* in New York, there would be no affirmance of the sale.

It is only the regularly appointed and principal administrator, having full power to represent the intestate, that can so bind him and control his rights.

Hunter *vs.* Princep, 10 East., 387.
Peters *vs.* Ballestier, 3 Pick., 495.
Story on Agency, § 259.

XII. It is said, Brief, p. 25, "the common law "allows either tennant in common of a ship, who "is in possession of it, *to employ it on his own ac-* "*count and risk, and at his own expense.*"

The cases in which a tenant in common of a ship is allowed "to employ it on his own account and risk, and at his own ex-"pense," are cases in which he does not pretend to be the entire owner, and to deny the ownership of his co-tenant. No such rule is applicable to a case like the present. To admit it to be would encourage fraud or illegal proceedings, with which the common law is not chargeable.

XIII. Respecting interest reference is made to argument for appellee, p. 40.

XIV. It is asserted in Brief, p. 26, that Van Pelt was entitled only to 10-20.

This is erroneous.

It appears that Van Pelt himself, and his administrators, paid for building 13-20. Arg., pp. 4 to 7.

Chenery says he proposed to pay David Van Pelt and S. Wing "their proportion received according to their interest "in the boat." Ans. 42, p. 69. What that proportion was appears from the testimony of Wing, who says, "We made "him a written proposition to buy his and Mr. Jessup's 7-20 "interest in the boat, and also one to sell him the heir's in- "terest of 13-20." "He declined accepting either, as he said "he did not consider them equal." No objection was made to their ownership of 13-20.

And yet he says he accounted to Johnson "for his interest." Ans. 37 cross, p. 69.

Frank Johnson did not own any part of the steamer.

When he states that he sold his interest to Chenery and Jessup, "being the claim aforesaid for 1-20 of said boat," the effect is only to shew that he misapprehended his legal rights. No part of the expenses for building the boat was paid by him. Whatever he advanced, if anything, was advanced to Van Pelt on a verbal agreement that he should have 1-20. His claim, if any, was upon Van Pelt's estate, not upon the boat as owner. Refer to Arg., p. 19, pos. 5.

Vanderbilt was not an owner of any part of the boat.

He was to have 2-20 on her arrival at San Francisco by Van Pelts direction.

This arrangement was revoked by letter of Sept. 1, 1853, and no part was by that to be in his name.

Refer to Arg., p. 17, pos. 4.

In his letter to David Van Pelt of July 5, 1854, Vanderbilt says, "I was willing she should be sold, provided my claim "was settled. Capt. Vail has since paid it, * * * and "I have nothing more to say about the boat, * * * and I "wash my hands of her." Rec., p. 142.

In his letter to Wing of July 20, 1854, Rec., p. 142, he says: "But as you have commenced quarreling, you must set-

"tle yourselves this matter, *for I am out of it, Vail having "paid my claim* and took entire charge."

In his testimony he states in substance that these statements made in his letters of different dates were not true. Ans. 26, p. 235. This testimony is unworthy of credit, being given after he had become interested to make the title of Deming good, at the hazard of the loss of her whole value, as he had with Vail entered into covenant that his title was free from all incumbrances. Rec., p. 24.

It is said in substance, Brief, p. 29, the appropriation of the proceeds of sale to the amount of $5,000 by Vail to discharge a mortgage made to him by Van Pelt and Chenery "*with the "assent of the representatives of the estate* amounts to an af- "firmation of the sale."

There is no proof of the assent of the representatives. They had nothing to do with the sale or receipt of, or appropriation of, the money, and they have so testified.

This was but a misappropriation, so far as Van Pelt's estate was concerned, of money unlawfully and fraudulently obtained.

It is also said in substance, in Brief, p. 30, that the payment of the services of Vanderbilt from the proceeds of the sale "amounts to an affirmance of the sale." If such payment was made it exhibits only another unauthorised act of Vail. He was no agent of Van Pelt's estate capable of affirming an unauthorised sale.

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Ellen Shipley
&
G. F. Shipley
Counsel for Appellee

SUPREME COURT OF THE UNITED STATES.

No. ~~276~~. 99.

EBER B. WARD AND STEPHEN CLEMENT, SURVIVORS OF SAMUEL WARD, DECEASED, COMP'TS,

vs.

PHILO CHAMBERLIN, JOHN H. CRAWFORD, JOHN H. CHAMBERLIN, ISAAC L. HEWITT, GEORGE W. McNEIL, AND OTHERS.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

GEO. S. GIDEON, printer, 511 Ninth street, Washington, D. C.

555.

SUPREME COURT OF THE UNITED STATES.

No. 276.

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ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

THE UNITED STATES OF AMERICA,
Northern District of Ohio.

At a stated term of the circuit court of the United States for the northern district of Ohio, begun and held at the city of Cleveland, in said district, on the second Tuesday of November, being the thirteenth day of the said month, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States of America the eighty-fifth.

Present, the Honorable John McLean, associate justice of the Supreme Court of the United States, and the Honorable Hiram V. Wilson, district judge and one of the judges of said court.

The following proceedings, among others, were had, to wit, on the third day of December, A. D. 1860:

EBER B. WARD and STEPHEN CLEMENT, survivors of Samuel Ward, deceased,
vs.
PHILO CHAMBERLIN, JOHN H. CRAWFORD, John H. Chamberlin, Isaac L. Hewitt, George W. McNeil, and others.
} No. 842.—In Chancery.

This cause having been heard at the July term of this court on

the defendants' demurrer to the complainants' bill, and having been argued by counsel, and taken under advisement, now, to wit, at the present term, the court being fully advised in the premises, stated as follows:

The bill sets forth that the complainants, on the twelfth day of November, A. D. 1856, upon appeal from the district court of Ohio, obtained a decree in the circuit court of the United States for the southern district of Ohio, for the sum of thirty-six thousand dollars, ($36,000,) against the defendants, Philo Chamberlin and John H. Crawford, in a proceeding by libel, filed in said district court on the 27th day of October, 1852, for damages sustained by the libellants by a collision, on the waters of Lake Erie, between the steamer Atlantic, belonging to the libellants, and the propeller Ogdensburg, belonging to said Chamberlin and Crawford, whereby the steamer was sunk and lost.

That the case was taken, by appeal, to the Supreme Court of the United States, and the decree of the circuit court there affirmed.

That on the 7th day of July, A. D. 1859, a joint decree was entered in said circuit court, upon the mandate of the Supreme Court, and by the agreement of the parties, against the said Chamberlin and Crawford, and also against the defendants, Isaac L. Hewitt, John H. Chamberlin, and George W. McNeil, their sureties in said appeal to the Supreme Court of the United States.

That it was further stipulated and agreed between the libellants and the defendants in said last named decree that the defendants, Philo Chamberlin and John H. Crawford, the original defendants in said libel, should make certain payments periodically, on account of said last named decree.

That if such payments should be punctually made, no execution should issue, but that in default of any such payment being made, as required by the said agreement, the complainants might thereupon proceed to collect the amount due and unpaid, as they should see fit.

That two such payments, amounting to one thousand dollars ($1,000) each, were made; that two defaults have since occurred; that complainants have caused execution to issue upon said last named decree, against the goods and chattels, lands and tenements, of the defendants in said decree; that the marshal found no goods or chattels whereon to levy, and that for want of such goods and chattels, he levied upon the several parcels of land belonging to said defendants, severally and respectively situated in the northern district of Ohio, described in the bill.

That the other defendants claim rights and interests in and liens upon said lands, in regard to which complainants are not particularly advised.

That said defendants in said decrees have no goods or chattels liable to execution, and no lands or tenements in the State of Ohio,

other than those levied upon and described in said bill, and that said defendants owned said lands as aforesaid at and before the time of the rendition of said first named decree, and have so owned them ever since that time.

The prayer of the bill is, for discovery; that the rights of the parties, and the dates and validity of their several liens, in respect of said lands, may be ascertained; that the lands may be sold and the proceeds applied, so far as can of right be done, to the payment of the amount due upon complainants' said decrees; and for general relief.

To this bill the defendants in said decrees filed a demurrer, and the complainants joined therein.

The following questions of law thereupon occurred before the court:

1. Whether either of said decrees was a lien upon said real estate of the defendants therein who owned such real estate as aforesaid.

2. Whether an execution can be issued upon a decree in admiralty in Ohio against the lands of the defendants, they having no goods and chattels liable to execution to satisfy the same.

3. Whether the issuing and levying of the execution in this case as aforesaid were not nullities, and whether the levy of said execution in any wise bound the lands upon which the same was so levied.

4. Whether real estate can be reached by proceedings in chancery to satisfy a decree in admiralty in Ohio, where the defendant has no goods or chattels liable to execution.

Upon which questions the opinions of the judges are opposed.

Whereupon, at the request of the complainants and of the defendants, who demurred as aforesaid, by their counsel, respectively, it is ordered by the court, during this term that the said foregoing points, upon which the disagreement of said judges hath happened, together with the foregoing state of the pleadings and statement of facts, which are made under the directions of said judges, be certified under the seal of said court to the Supreme Court at their next session to be held hereafter, to be by said court finally decided.

UNITED STATES OF AMERICA,
Northern District of Ohio.

I, Frederick W. Green, clerk of the circuit court of the United States for the northern district of Ohio, do hereby certify the foregoing to be a full and true copy of the entry in the above entitled cause from the minutes of the proceedings of said court.

Witness my official signature and the seal of said court, at the city of Cleveland, in said district, this fourth day of December, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States of America the 85th.

[L. S.]

F. W. GREEN, *Clerk.*

Filed 13th Dec., 1860.

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Supreme Court of the United States,

DECEMBER TERM, 1861.

EBER B. WARD, ET. AL.

vs.

PHILO CHAMBERLAIN, ET. AL.

IN CHANCERY.

BRIEF FOR COMPLAINANTS.

JOHN S. NEWBERRY,
Complainant's Solicitor.

Is a Decree in Admiralty in Ohio a Lien upon Real Estate? Upon what foundation rests the Lein of Judgments and Decrees of the Courts of the United States?

CLEVELAND, OHIO:
PRINTED BY FAIRBANKS, BENEDICT & CO., HERALD OFFICE.
1862.

Supreme Court of the United States.

EBER B. WARD ET AL.

vs.

PHILO CHAMBERLAIN ET AL.

IN CHANCERY.

At the hearing of this case in the Circuit Court of the United States, N. H. Swayne, Esq., submitted a brief for Complainants which was substantially as follows:

I. The facts of the case, as set forth in the bill, so far as it is necessary to state them, are substantially as follows:

That the complainants, on the 12th day of November, A. D. 1856, upon appeal from the District Court, obtained a decree in the Circuit Court of the United States for the Southern District of Ohio, against the defendants, Philo Chamberlain and John H. Crawford, in a proceeding by libel for damages sustained by the libellants by a collision on the waters of Lake Erie, between the steamer Atlantic, belonging to the libellants, and the propeller Ogdensburg, belonging to said Chamberlain and Crawford, whereby the steamer was sunk and lost:

That the case was taken by appeal to the Supreme Court of the United States, and the decree of the Circuit Court there affirmed:

That on the 7th day of July, A. D. 1859, a joint decree was

entered in said Circuit Court, upon the mandate of the Supreme Court, and by the agreement of the parties, against the said Chamberlain and Crawford, and also against the defendants, I. L. Hewitt, John H. Chamberlain and George W. McNeil, their sureties in said appeal to the Supreme Court of the United States: That it was further stipulated and agreed between the libellants and the defendants in the said last-named decree, that the defendants, Philo Chamberlain and John H. Crawford, the original defendants in said libel, should make certain payments periodically on account of said last-named decree:

That if such payments should be punctually made, no execution should issue; but that in default of any such payment being made as required by the said agreement, the complainants might thereupon proceed to collect the amount due and unpaid, as they should see fit:

That two such payments were made: that two defaults have since occurred: that complainants have caused execution to issue upon said last-named decree, against the goods and chattels, lands and tenements of the defendants in said decree; that the marshal found no goods or chattels whereon to levy, and that for want of such goods and chattels he levied upon the lands belonging to the said defendants, situated in the Northern District of Ohio, described in the bill:

That the other defendants claim rights and interests in, and liens upon said lands, in regard to which complainants are not particularly advised:

That said defendants in said decrees have no goods or chattels liable to execution, and no lands or tenements in the State of Ohio, other than those levied upon and described in said bill.

The prayer of the bill is, for discovery, that the rights of the parties and the dates and validity of their several liens in respect of said lands may be ascertained, that the lands may be sold and the proceeds applied, so far as can of right be done, to the payment of the amount due upon said complainants' decree, and for general relief.

To this bill the defendants in said decrees filed a general demurrer.

A hearing was had on the questions raised by the Demurrer in the Circuit Court of the U. S. for the Northern District of Ohio, at the July Term, 1860, and the opinions of the Judges being opposed, the questions were certified to this Court for decision.

The grounds relied upon by said defendants are:

(1.) That neither of said decrees was a lien upon the lands of the defendants, against whom the same was taken:

(2.) That the 21st Rule in Admiralty, established by the Supreme Court of the United States (January Term, 1845), limits executions upon such decrees to goods and chattels, and forbids their issuing against lands and tenements:

(3.) That the execution in this case, as against the lands and tenements of the defendants and the levy thereof, were nullities:

(4.) That the bill does not make a case which entitles the complainants to relief in equity.

II. THE CASE STANDS IN ALL RESPECTS, AS REGARDS THE QUESTIONS TO BE DECIDED, AS IF THE DISTRICT HAD NOT BEEN DIVIDED SINCE THE FILING OF THE LIBEL.

This was admitted in the argument in the Circuit Court, and need not, therefore, be here considered.

III. THE DECREES IN THIS CASE ARE MADE LIENS UPON THE REAL ESTATE OF THE DEFENDANTS, BY THE 4TH SECTION OF "AN ACT IN ADDITION TO THE ACTS RESPECTING THE JUDICIAL SYSTEM OF THE UNITED STATES," approved July 4th, 1840. (5 Peters' Stat. 392; Brightly's Dig. 449.)

That section is as follows:

"Section 4. And be it further enacted, that judgments and decrees hereafter rendered in the Circuit and District Courts of

the United States within any State, shall cease to be liens no real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such State now cease by law to be liens thereon; and the respective clerks of the United States Courts in such State, shall receive the like fees for making searches and certificates respecting such liens, as are now allowed for like services to the clerks of the Supreme Court of such State; and the eighth, ninth and tenth sections of the act entitled an act to amend the act of the 3d of March, one thousand eight hundred and thirty-seven, entitled 'An act supplementary to an act to amend the judicial system of the United States, and for other purposes,' passed March 3d, one thousand eight hundred and thirty-nine, are hereby repealed."

(1.) The act of March 3d, 1839 (5 Pet. 337), contains numerous local provisions relating to the Circuit and District Courts of several States therein named. The 10th and last section—repealed by the act of July 4th, 1840, is as follows:

Section 10. And be it further enacted, that *every judgment* which shall have been rendered, either in the District or Circuit Courts aforesaid, previous to the passage of this act, shall, as against subsequent purchasers or encumbrances, cease to be a lien upon the real estate or chattels real of the person or persons against whom such judgments may have been rendered respectively at the expiration of five years from the passage of this act, and every *judgment* to be hereafter rendered in either of said courts, shall, as against subsequent purchasers or incumbrances, cease to be a lien upon the real estate or chattels real of any person or persons against whom such judgments shall be rendered, at the expiration of ten years from and after the day of docketing such *judgments* respectively."

(2.) It will be observed that this section of the act of 1839 is limited to *judgments* in the courts of the United States in the States named in that act, and perhaps, to those of such courts in the State of New York, (see the context of the act.)

It is silent as to the *decrees* of those courts in *those States*, and as wholly silent as to *judgments and decrees—both*, of those courts—in the other States.

(3.) Within less than a year after the passage of the act of 1839, Congress wholly repealed the provisions of that act upon the subjects of the liens of judgments, and passed the 4th section of the act of 1840, above set forth, in substitution for them.

(4.) The provisions of that section differ from those of the act of 1839, repealed by it in the following particulars:

(a.) The act of 1840 extends to *all the States*.

(b.) It embraces *decrees* as well as judgments.

(c.) It prescribes no time for the cessation of the liens to which it refers, but adopts and applies the State laws as to the liens of judgments and decrees in the State courts.

(5.) These changes have a weighty significance. It cannot be misapprehended, and requires no comment.

(6.) This section of the act of 1840 speaks of "judgments and *decrees* of the courts of the United States within any State." This must embrace decrees in Admiralty, for two reasons:

(a.) The language is general. There is no discrimination as to the kind of *decrees* referred to. All are therefore included.

One of the first canons of interpretation is: "It is not allowable to interpret what has no need of interpretation." Sedg. St. & Com. Law, 227.

(b.) The District Court could render *no decrees* save in Admiralty. *It had no equity jurisdiction.*

The district judges could *allow* writs of injunction, "Provided that the same shall not, unless so ordered by the *Circuit Court*, continue longer than to the Circuit Court next ensuing, nor shall an injunction be issued by a district judge in any case, where a party has had a reasonable time to apply to the Circuit Court for the writ."

(Act of Feb. 13th, 1807, Sec. 1; 2 Peters, 418; Bright, 257.)

(7.) The language used—"judgments and decrees hereafter rendered in the Circuit and District Courts of the United States," may as well be made to *include decrees in Admiralty*, and to *exclude decrees in Equity* as the opposite. There is no reason for excluding either.

(8.) In referring to the "judgments and decrees" of the courts of the States, it will be observed that the language used is equally comprehensive. It is not judgments and decrees of the State Courts *in like cases*. It refers to them generally, without limit or qualification. As the State Courts could render no decrees in Admiralty, the reference is necessarily to *the decrees of those Courts in Chancery*.

(9.) Decrees in equity, for the payment of money, have always had the same lien in Ohio as judgments at law. In all the mutations of our legislation, this feature of our statutory jurisprudence has been invariably preserved.

See act of Feb. 19th, 1810, Sec. 40. 1 Chase 689.
Act of Jan. 22d, 1824, Sec. 38; 2 Ibid. 1281.
Act of March 14th, 1831, Sec. 34; 3 Ibid. 1692.
Act of July 1st, 1853; Code, Sec. 421; Swan's Stat. 675.

(10.) But if the language used had been "judgments and decrees of the courts of the State," *in like cases*, the result would have been the same.

(11.) The Ohio Water Craft Law, (Swan's Statute, p. 185,) was passed and took effect on *the 20th of February*, 1840.

That act provides as follows:

Sec. 1. "That steamboats and other water crafts navigating the waters within, *or bordering on this State*, shall be liable for debts contracted on account thereof by the master, owner, steward, consignee or other agent, for materials, supplies, or labor

in building, repairing, furnishing, or equipping the same, or due for wharfage and for damages arising out of any contract for the transportation of "goods or persons, *or for injuries done to persons or property by such craft.*

Sec. 2. "Any person having such demand may proceed against the owner or owners, or master of such craft, or against the craft itself."

Immediately after the passage of this act, a large amount of business was done under it, and a large number of judgments were recovered.

(12.) The act of Feb. 20th, 1845, Sec. 1, (5 Pet. 726, Bright. 25,) by which the admiralty jurisdiction of the Courts of the United States is extended over the lakes, saves to parties concerned the right of a concurrent remedy at Common Law where it is competent to give it, and any concurrent remedy which may be given by the State laws.

(13.) The validity of the water-craft law above set forth has been repeatedly affirmed by the Supreme Court of Ohio, and never denied by any tribunal.

2 Ohio S. Rep. 26. *Thompson* v. *S. B. Morton.*

3 Ohio S. Rep. 105. *Keating* v. *Spink.*

See also 10 O. R. 384; 11 Ibid. 458; 12 Ibid. 341; 14 Ibid. 28; Ibid. 72; Ibid. 408; 15 Ibid. 585; 16 Ibid. 91, 178, 276; 17 Ibid. 123, 359, 460; 18 Ibid. 187, 375; 20 Ibid. 62.

(14.) It has also been held that the jurisdiction of the State Court, where it first gets possession of such a case, is exclusive and final.

3 Ohio S. Rep. 105. *Keating* v. *Spink.*

20 How. (U. S.) 583. *Taylor* v. *Carryl.*

(15.) The implication arising from the language of the act of 1840, under consideration, is equivalent to an express affirmation that judgments and decrees in the Courts of the United States

shall be liens upon real estate *until they cease to be so in the manner and at the times specified in the act.*

2 Paine's Rep. 251. *Koning* v. *Bayard, et al.*

"The declaration in the act of New-York, of March 19, 1787, that no judgment shall *affect* land, but upon the filing of the roll and docketing the judgment, necessarily implies that upon that being done it shall affect the lands, and *is equivalent to saying*, it shall then become a lien."

Ibid. 252. Syllabus.

"The declaration that no judgment shall affect lands, but upon the filing of the rolls and docketing the judgment necessarily implies that upon that being done, it shall affect the lands, and is equivalent to saying that it shall then become a lien."

Ibid. 254. Opinion of Thompson, J.

In regard to the implication and its effect here insisted upon in respect to this statute, Judge Grier says: "*This doctrine is fully recognized by implication* in several acts of Congress touching this subject. *" "* Act of May, 1828, § 2, and 4th July, 1840, § 4."

Wallace, jr.'s Rep. pp. 198–9. *Lombard* v. *Bayard.*

The same rule applies in other cases.

Whatever is *implied* in a pleading is traversable as much as if it were expressly alleged.

3 Wend. 258. *Haight* v. *Holley.*

"It is a general principle, applicable to all instruments or agreements, that whatever may be fairly implied from the terms or language of an instrument, is, in judgment of law, contained in it."

19 Wend. 252. *Rogers* v. *Neeland.* Nelson, J.

As to wills, see 6 J. R. 185; 18 J. R. 31; Com. Dig. "Devise," n. 12.

In this case the complainants could have sued at common law, in the Circuit Court of the United States, or the proper State Court, or they could have proceeded in the State Court under the

Water craft law; and they had the option—which they exercised —to proceed in the District Court of the United States, going therefrom by appeal to the Circuit Court.

If they had sued at common law in either court, or in the State Court *in personam*, under the Water craft Law, a judgment against the original defendants for money, would have been a lien upon their real estate, and execution upon it would have issued against their goods, chattels, lands and tenements. Will it not be most singular if a decree for money in the Circuit Court upon the same cause of action, against the same defendants, is not a like lien, and that execution can issue upon it only against the goods and chattels, and not against the real estate of the defendants? What is there that creates this anomalous exception as to real estate? This inquiry will be further considered in the course of my further remarks.

(5.) In reply to this proposition it was said at bar, that the object of this act of 1840 was to *limit* not to *create* liens. This is true, but it leaves untouched and in full force the point of *implication* upon which I rely. There can be no negation without an affirmation to deny. The same objection might have been made to the construction given to the New York act of 17 7, in the case in 2d Payne.

The object of that act also, "was to *limit* not to *create* a lien." The parallelism between the proposition there decided and here maintained, is complete.

IV. For the sake of brevity and clearness in respect of my further propositions, I here present in connection the several acts of Congress which are believed to bear upon the subject under discussion.

(1.) "An act to establish the Judicial Courts of the United States." Approved Sept. 24, 1789. 1 Pet. Stat. 73; Bright, 792.

"Sec. 14. That all the before-mentioned Courts of the United

States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

"Sec. 34. That the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply."

(2.) "An act for regulating processes in the Courts of the United States and providing compensation for the officers of the said Courts, and for jurors and witnesses." Approved May 8th, 1792. 1 Pet. Stat. 275; Bright, 793.

"Sec. 2. That the forms of writs, executions, and other process, except their style, and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the act entitled 'An act to regulate processes in the Courts of the United States,' in those of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usuages which belong to courts of equity and to courts of admiralty respectively, as contra-distinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, *subject, however, to such alterations and additions as the said Courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time by rule, to prescribe to any Circuit or District Court concerning the same:* Provided, That on judgments in any of the cases aforesaid, where different kinds of executions are issuable in succession, a *capias ad satisfaciendum*, being one, the plaintiff shall have his election to take out a *capias ad sdtisfaciendum* in the first instance."

The act first referred to in the preceding section was approved

Sept. 29, 1789, and expired by its own limitation at the end of the next session of Congress. See 1 Pet. Stat. 94.

(3.) "An act in addition to the act entitled 'An act to establish the judicial Courts of the United States.' Approved March 2, 1793. 1 Pet. Stat. 333; Bright. 793.

"Sec. 7. That it shall be lawful for the several Courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective Courts, directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in the vacation and otherwise, in a manner not repugnant to the laws of the United States; *to regulate the practice of said Courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings.*"

(4.) "An act further to regulate process in the Courts of the United States." Approved May 19th, 1828. 4 Pet. Stat. 278; Bright. 794.

Sec. 2. That in any one of the United States where judgments are a lien upon the property of the defendant, and where, by the laws of such State, defendants are entitled in the Courts thereof to an imparlance of one term or more, defendants in actions in the Courts of the United States holden in such State shall be entitled to an imparlance of one term."

Sec. 3. That writs of execution and other final process *issued upon judgments and decrees*, rendered in any of the Courts of the United States and the proceedings thereupon, shall be the same, except their style, in each State respectively, as are *now* used in the courts of such State, *saving to the Courts of the United States, in those States in which there are not Courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of Court; provided, however, that it shall be in the power of the Courts, if they see fit in their discretion, by rules of Court, so far*

to alter final process in said Courts, as to conform the same to any changes which may be adopted by the Legislatures of the respective States for the State Courts."

(5.) "An act further suplimentary to an act entitled 'An act to establish the Judicial Courts of the United States,' passed the 24th of September, 1789." Approved Aug. 23d. 1842. 5 Pet. Stat. 516; Bright. 792.

"Sec. 6. That the Supreme Court shall have full power and authority, from time to time, to prescribe and regulate, and alter the forms of writs and other process to be used and issued in the District and Circuit Courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said Courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the Court, *and generally to regulate the whole practice of the said Courts, so as to prevent delays, and promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.*"

(6.) In this connexion I present, also, the 21st rule in admiralty, established by the Supreme Court of the United States, December Term, 1844.

"Rule XXI. In all cases where the decree is for the payment of money, the libellant may at his election have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias* and of a *fieri facias* commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution. In all other cases the decree may be enforced by an attachment to compel the defendant to perform the decree, and

upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law or by the order of the court."

V. THESE DECREES ARE MADE LIENS ON REAL ESTATE BY THE ACT OF CONGRESS OF 1828.

(1.) The 3d section of that act provides that "writs of execution and other final process issued on judgments and decrees *rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same*, except their style, in each State respectively, *as are now used in the courts of such State.*"

(2.) This language necessarily includes the District Court and its decrees in Admiralty. It has been already shown that the District Courts have no equity jurisdiction and can render no *decrees* except *in Admiralty.* The act makes no discrimination as to courts or decrees. It embraces *all* alike.

(3.) Nor is there any discrimination as to the kinds of the decrees and the process upon them in the State Courts. The final process and proceedings thereon, upon decrees "rendered in any of the Courts of the United States," are to be the same, "except their style," as those used "in the courts of such State." It has already been remarked that State Courts could render no decrees in Admiralty. Of course *decrees in equity* of the State Courts are those referred to.

(4.) It has been shown that when this act was passed, and for years before, decrees in Chancery for the payment of money had in Ohio the same lien upon real estate as judgments. It may now be added that execution has always issued upon them against the goods, chattels, lands and tenements of the debtor, in all respects as upon judgments at law.

See references to Chase's Statutes, III., (9,) p. 6.

(5.) This process upon *the decrees* of the Circuit and District Courts of the United States, was adopted by the act of 1824.

When this act was passed the only *process* "*used*" in the State Courts of Ohio, upon judgments at law and decrees for the payment of money, was *execution* against the goods, chattels, *lands* and *tenements* of the defendants.

(6.) It may be said there were no admiralty decrees in Ohio, until after the passage of the act of 1845, which extended the admiralty jurisdiction of the United States over the Lakes. If so, I reply:

(a.) The language of the act is *prospective* as well as unqualified—"decrees rendered in any of the Courts of the United States."

(b.) A future "*decree*" under a *new* or *old* jurisdiction would be the same in principle and effect as regards this question. The act applied unquestionably in the States where there were *then* admiralty courts, and courts of equity, and where executions against lands and tenements were issuable upon decrees in equity for the payment of money. Why should it not apply in like manner in Ohio, to decrees in admiralty thereafter rendered, under a jurisdiction subsequently conferred? Why should there be a different rule in Ohio from that in other States having the same system as to the liens of judgments and decrees upon real estate?

(c.) The act will be liberally construed, if need be, to accomplish the obvious purpose of Congress.

(7.) It has been said that it is "*doubtful*" whether this act was intended to embrace decrees in admiralty because it contains a saving as to the power of the Courts in respect of decrees in equity in certain States, and none as to the decrees in admiralty.

(a.) The previous language of the section is broad enough to include decrees in admiralty.

(b.) If the attention of the draughtsman of the act had been called to the saving and omission referred to, the answer might well have been:

(c.) That the power of the Courts of the United States to reg-

ulate their practice, and to mould their final process *in all cases* as they might deem fit, given by the acts of 1792 and 1793, was not taken away or in the least abridged by the act of 1824.

(d.) After the passage of that act that power was just as ample in admiralty as it was before. It existed to the same extent in equity, common law and admiralty. The saving referred to was cumulative, and gave *a less power* where *a greater* already existed, and was therefore wholly unnecessary and ineffectual.

(8.) The first legislation in Ohio on the subject of judgments and executions, made real estate liable to satisfy them. The first act in the series was the territorial law of Aug. 15, 1795, (1 Chase, 138), entitled "A law subjecting real estate to execution for debt." It was adopted from Pennsylvania. The first section is as follows:

"Sec. 1. *To the end* that no creditors may be defrauded of debts justly due to them from persons who have sufficient real if not personal estates to satisfy the same; all lands, tenements and hereditaments whatsoever, where no sufficient personal estate can be found, shall be liable to be seized and sold upon judgment and execution obtained."

This act was repealed by "An act to regulate executions," of Jan. 19, 1805. (1 Chase, 316)

The first section of this act is substantially the same with that of the act of 1795.

The second section is as follows:

"Sec. 2. That the lands, tenements, and real estate of the defendant shall be bound and liable to the satisfaction of the judgment from the first day of the term in which such judgment is obtained, and the goods, chattels and personal estate of the defendant shall be bound by and be liable to the satisfaction of the judgment from the time of their being taken in execution by the sheriff or other officer, and not before."

These provisions have been continued in the legislation of the State without intermission, down to the present time. Such has always been the policy of Ohio.

The act of 1795 contained no provision like the second section of the act of 1802 *in terms*, making judgments a lien upon real estate, but the Supreme Court of Ohio, in 1 Ohio Rep. 812—*Roads* v. *Symmes and others*—say:

"It has long been settled that the judgment of a court of record operates as a lien upon the real estate of the defendant. Whether this is a maxim of the common law, or was first introduced by the statute of Westminster 2, is of no importance in the case. The law of 1795, declaring what laws shall be in force, adopts the common law, and all statutes of the British Parliament made in aid of it, prior to the fourth year of James the First. In either case this law established the principle amongst us, and it has been acted upon from the commencement of the admisistration of jusiice in the Territory.

"It is equally well settled that this lien is co-extensive with the territorial jurisdiction of the court that renders the judgment. The general Court of the Territory exercised jurisdiction and sent its process, original and final, into every county within the Territory. The judgments rendered by it were of consequence, a lien or charge upon all the lands owned by the defendants, and situate anywhere in the Territory. This, it is understood, is not controverted."

(9.) *The right to issue an execution upon a decree in admiralty under the act of* 1824, *rendered the decree ipso facto, from its rendition, a lien upon the lands of the defendants. A lien is the necessary result of the right to issue such process:*

13 Pet. 499. *Burton* v. *Smith and others*
7 How. (U. S.) 765. *Massingill* v *Downs.*
2 McLean, 80. *Shrew et al.* v. *Jones.*
3 Pet. 124. *U. S.* v. *Morrison.*
2 Brok. 253.
2 Call, 125.
4 Hen. and M. 57.
1 Blackf. 401.

(10.) Judgments in personal actions were not liens upon real

estate by the common law. The lien arose from the right to issue a writ of *elegit*. That was given by the statute of Westminster 2, C. 18, 13 Ed. I.

For the English authorities upon this subject, see 7 Howard, 765, *Massingill* v. *Downs*, and 2 McLean, 80, *Shrew et al* v. *Jones*, above referred to.

If the judgment debtor died after the *elegit* was executed upon his land, and before the judgment was satisfied, a court of equity, upon being applied to, would decree a sale of the land upon which it had been executed, and payment of the judgment out of the proceeds.

1 Atkyns, 607. *Stileman* v. *Ashdown*.

3 Jacob, 212. *Tyndal* v. *Warre*.

The same principle was adopted by Lord Redesdale into the Equity Jurisprudence of Ireland.

2 Schoales and Lef. 130. *O'Goman* v. *Comyn*.

Ibid 18. *O'Fallon* v. *Dillon*.

The reasons why lands were not liable to be taken in execution at common law are thus stated by Bacon (2 Bac. Ab. Execution, A):

"The lands were not liable because they were obliged to answer the duties of the feudal lord, and a new tenant could not be forced upon him without his consent in the alienation; and the person was not liable, because he was obliged by the tenure to serve the king in the wars, and at home the several lords, according to the distinct nature of their tenure."

These reasons will hardly be deemed sufficient to exempt lands from being taken in execution to satisfy a decree in admiralty in Ohio.

The statute of Virginia upon the subject of executions was nearly a transcript of the statute of Westminster.

The courts of that State, following the English courts, adopted their construction of the statute of Westminster as to the lien, and also the equitable remedy where the judgment debtor died after the execution of the writ upon his land, and before the judgment was satisfied.

2 Leigh, 58. *Lawrence* v. *Blow.*
6 Leigh, 219, 220. *Tennent's heirs* v. *Pattons.*

All the American cases referred to are bottomed upon the English decisions upon the statute of Westminster. Where a statute expressly creates a lien, it of course rests upon that foundation, and not upon any implication or construction.

(11.) Originally a decree in equity for the payment of money in England was no more a lien upon real estate than a decree in admiralty, and real estate could no more be taken in execution to satisfy the one than the other.

"Formerly a decree in a Court of Equity, unless it was for the land itself, operated only *in personam;* and the only method of enforcing it was by means at what is called process of contempt against the party disobeying it, under which the party, if arrested, might be kept in prison till he obeyed. It was also competent to the party claiming the benefit of the decree, where the contemnor either could not be arrested upon the process, or having been arrested, remained in prison without paying obedience to the Court, to issue a writ of sequestration directing the Commissioners therein named, to sequester the personal property of the defendant, and the rents and profits of his real estate, and to keep him from the enjoyment of them, till he has cleared his contempt, in the same manner as in the case of a defendant who had committed a contempt by not appearing and answering the bill. *Originally, this process was merely used as a means of coercing the defendant. by keeping him out of possession of his property; and the practice of applying the money received by the sequestrators in satisfaction of the sum decreed to be paid,* is of comparatively modern origin."

2 Dan. Ch. Prac, pp., 1236, 1237.

This condition of things continued until the taking effect of the act of 1 and 2 Victoria, C. 110.

That act provides that decrees for the payment of money

"shall have effect of judgments in the superior Courts of Common Law."

2 Dan Ch. Prac. 1238.

(12) In 1 Salk. 33, *Betts* v. *Hancock*, a prohibition was applied for to prevent the admiralty court from proceeding against the stipulators of a deceased defendant in admiralty. Among other arguments advanced in support of the application, it was said: "And also that land and tenements were entirely under the protection of common law, and they could not take stipulations in the realty."

This reasoning would certainly not apply here. The case was never decided. The result is shown in the last sentence of the report. "Adjourned and compounded."

(13.) The Admiralty Court in England is not a court of record.

"It is no court of record any more than the spiritual courts." 3 Blac. Com. 69.

"Also the Admiralty Courts which are not courts of record, but derive their authority from the crown, and are subject to the control of the king's temporal courts, when they exceed their jurisdiction." * * *

"A court that is not a court of record cannot impose any fine on an offender, nor award a capias against him, nor hold a plea of debt or trespass, if the debt or damages amount to 40 shillings," etc.

1 Bac. Ab. Courts, D.

They are courts "where the proceedings are not enrolled or recorded, but their existence, as well as the matters therein stated, shall, if disputed, be tried and determined by a jury."

3 Blac. Com. 25.

All the courts of the United States which exercise admiralty jurisdiction—whether original or appellate—the District, Circuit and Supreme Courts, are courts of record.

(14.) Among "the Rules of the District Court of the United

States for the Southern District of New York," are the following:

"Rule 146. A party obtaining the decree of the Court may at his election have for the execution thereof, like process as is now used in this State for like purposes, except that for personal attachment, as for a contempt of court.

"Rule 147. The writ of *fieri facias* and *venditioni exponas* is adopted as final process in this court, in all cases for the sale of property, and the proceedings thereon in admiralty cases, shall be comformable to those on the common law side of this court."

Benedict's Admiralty, 380.

It is understood that these rules are still in force and are constantly practiced upon, and that they are regarded as in nowise affected by the 21st Rule of the Supreme Court.

Judge Betts, in his work on Admiralty Practice, in the Southern District of New York, p. 27, says:

"There is also an express consent connected with the stipulation, that if the condition is not performed the court may order execution for the amount, against the goods, chattels, lands and tenements of the stipulators. (Rule 59.")

"The court having possession of the principal matter, has jurisdiction over all its incidents, and may therefore enforce its decrees against the parties to the security by direct proceeding; and as the *fi. fa.* or *vend. exp.* uniformly go against personal and real property, there can be no doubt they would be the process through which the forfeiture of the stipulation would be enforced, *although no consent was given to that effect.*"

(15.) In regard to the 21st Rule of the Supreme Court:

(a.) The 14th section of the Judiciary Act of 1789 gives to the courts of the United States the power to issue all writs "which shall be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

This includes all necessary and final process.

10 Wheat. 55. *Bank U. S.* v. *Halstead.*

"The jurisdiction of a court is not satisfied by the rendition of its judgment, but continues until the judgment shall be satisfied."

10 Wheat. 23. *Wayman* v. *Southard.*

(b.) This rule was not intended to take away any right or remedy given by any act of Congress, nor could any rule of court have that effect. It can no more take away the right to issue an execution against lands and tenements upon a decree in admiralty, if such right existed before the rule was established, than could a like rule, in respect of common law judgments, limit executions upon them, to goods and chattels, and take away the right now subsisting, to issue against lands and tenements. The law-making power is vested in Congress exclusively; any rule of court, in contravention of an act of Congress, is void.

16 Peters, 89. *Henry et. al.* v. *Mer. Bank of Memphis.*

Ibid. 314. *Amis* v. *Smith.*

2 Howard, 614. *McCracken* v. *Hayward.*

(c.) The Act of 1842 was not intended to give the Supreme Court power to establish any rule in conflict with any pre-existing statutory right. The grant of power relied upon—"and generally to regulate the whole practice of said courts"—is thus limited in the continuation of the same sentence—"*so as to prevent delays and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.*"

(d.) This rule, and the others belonging to the same set and system, are merely directory and cumulative. They are not peremptory and exclusive. Cases, I am advised, are numerous and of constant occurrence in the courts of the United States, in which this is illustrated. A learned friend has furnished me with the following authorities in support of these remarks:

Ware's Rep. 490. *The Centurian.*

1 Blatch. and How. 34. *Waterbury* v. *Myreck.*

5 Pet. 675. *Shepherd* v. *Taylor et. al.*

Gates et. al. v. *Willard et. al.*—decided by Judge McLean,

July, T. Cir. Ct. of U. S., N. N. Dist. Ohio, upon appeal—not yet reported.

(e.) The policy of the Courts of the United States, has uniformly been to put suitors in those courts upon a footing, as respects their remedies, at least as favorable as that of suitors in the State Courts; and to harmonize in all respects as far as practicable, without injury to the rights of the foreign suitor, the entire system of precedure in the courts of the two sovereignties. This is apparent from all the cases in which these subjects have been adverted to. If the complainants had recovered at common law, or under the Ohio Water-craft law in the State Court, the judgment would have been a lien upon real estate. Why should not the decree in the District Court have the same effect?

(16.) The act of Congress of Aug. 23d, 1842, sec. 8, (5 Pet. 518; Bright. 449,) makes judgments in the courts of the United States bear the same rate of interest which judgments in the State Courts bear in the same States respectively.

In 16 Pet. 311, *Amis* v. *Smith*, a case from Mississippi, the court say:

"If, however, the question were properly before the court, we can see no good reason why interest upon a judgment which is secured by positive law, is not as much a part of the judgment *as if expressed in it.* The Legislature (of the State) 'say all judgments shall bear interest at the rate of 8 per cent.' Can this judgment be satisfied without paying the interest?"

Can there be any doubt that a decree in admiralty for the payment of money, would bear interest according to the rate fixed by the State in analogous cases? Why does not the *same lien* attach to such decrees as to decrees in the State courts? This is necessary to the completeness and harmony of the system in the courts of the United States, and it is also necessary to the harmony of the systems of the two sovereignties.

(17.) The legal provision for taking admiralty and equity

cases by appeal from the Circuit Court to the Supreme Court of the United States is the same:

"And from all final judgments or decrees, rendered or to be rendered in any Circuit Court, or in any District Court acting as a Circuit Court, *or in any cases of equity, or admiralty and maritime jurisdiction*, and of prize or no prize, an appeal where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States." Act of March 3d, 1803, § 2. (2 Pet. Stat. 244 Bright. 260–261.) Are they not alike also in the liens of their decrees?

(18.) The implication arising from the 2d section of the act of 1828 is not to be overlooked. It has not been pressed, because that section speaks only of "*judgments*." But it is of great value as an argument, and also an illustration with reference to the propositions maintained under both the 3d section of the act of 1824, and the 4th section of the act of 1840.

V. THE LIEN OF JUDGMENTS AND DECREES OF THE COURTS OF THE UNITED STATES IS A RULE OF PROPERTY ARISING UNDER THE LAWS OF THE SEVERAL STATES. THOSE COURTS ADOPT THEREIN THE LAWS OF EACH STATE AS TO THE LIEN OF ITS OWN JUDGMENTS AND DECREES, UNDER THE 34TH SECTION OF THE JUDICIARY ACT OF 1789. UPON THIS FOUNDATION RESTS THE LIEN OF THE JUDGMENTS AND DECREES OF THE FEDERAL COURTS.

(1.) This is strenuously denied by Defendant's Counsel. It is insisted that the lien of judgments and decrees of the courts of the United States are wholly dependent upon the process and practice acts of Congress, whereby the State laws upon the subject were adopted as a matter of practice.

The following authorities were relied upon in the court below, in support of this proposition:

(a.) 10 Wheaton, 1. *Wayman* v. *Southard.*

In this case the point decided was: "The statutes of Kentucky concerning executions, which require the plaintiff to in-

dorse on the execution that bank-notes of the Bank of Kentucky or notes on the Bank of the Commonwealth of Kentucky, will be received in payment, and on his refusal authorize the defendant to give a replevin bond for the debt, payable in two years, are not applicable to executions issuing on judgments rendered by the courts of the United States." (Syllabus.)

The Court also held that "the 34th section of the Judiciary Act of 1789, c. 20, which provides 'that the laws of the several States,' etc., 'shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply,' does not apply to the process and practice of the Courts. It is a mere legislative recognition of the principles of universal jurisprudence, as to the operation of the *lex loci*."

How the lien of judgments in the courts of the United States arises, whether under the 34th section of the act of 1789, or the process act of 1792, is neither discussed nor decided. The subject is not mentioned.

(b.) 1 Pet: Rep. 286. *Conrad* v. *The Atl. Ins. Co.*

In this case the character of a judgment lien is strongly stated, but how the lien arises, and upon what it is founded, are questions not alluded to.

(c.) 5 Ohio Rep. 398. *Sellers* v. *Corwin.*

In this case the lien of judgments in the courts of the United States in Ohio, is admitted by the Supreme Court of the State. They do not distinctly decide whether such lien is a rule of property, or arises from the adoption of the State practice.— They seem to place it on both grounds, certainly quite as much on the former as the latter. See particularly pp. 405, 406.

(d.) 2 Paine's R. 251. *Koning* v. *Bayard.*

This case is in point for defendants. The court decided that the lien subsisted, and then gave their opinion as to the foundation upon which it rested. In my judgment they "pitched the power upon the wrong location."

(e.) 7 How. 760. *Massingill* v. *Downs.*

"Where a judgment was obtained in the Circuit Court of the

United States for the District of Mississippi, in 1839, and in 1841 the State of Mississippi passed a law requiring judgments to be recorded in a particular way, in order to make them a lien upon property, *this statute did not abrogate the lien* which had been acquired under the judgment of 1839, although the latter had not been recorded in the manner required by the statute."

This is the entire syllabus of the case. It shows the point decided. It was that the lien of a judgment in a court of the United States, which has already attached, can not be displaced by subsequent State legislation. This in no wise touches the question here under consideration, for admitting that liens are as is claimed, "*rules of property*," the decision may be supported upon the principle that rights which have vested under a statute which is subsequently changed or repealed, are not thereby affected.

Smith on Com. 881.

Sedg. St. & Com. L. 195.

The point here under consideration was pressed with great ability by the counsel for the defendant in that case. He said, among other things:

"The lien of a judgment is a quality added to it, a quality not in any manner altering it as the sentence of the court, but superadded to it, taking effect on property, qualifying property, restraining the alienation of property; not by an act of appropriation and sale under an execution (which come under the denomination of 'proceedings,' and are subsequent to the judgment), but as the effect of the mere existence of the judgment."

* * * *

"It is only by virtue of local law that this lien exists. It is a qualification of property which can only be derived from the sovereignty within whose jurisdiction the property to be effected by it is situated. That sovereignty can confer it or take it away, or modify it when conferred. That sovereignty can attach it to a judgment, or to a bond, or to any thing else. But wherever and however attached, it is a regulation of property

emanating, not from the court, but from the local authority."

* * * *

"Second, the lien attached to a judgment is not (within the meaning of the acts of Congress) any part of the 'process' of a court, or of its modes of proceeding.

"If it is, it must be a part either of the final process, or else of the modes of proceeding to carry the judgment into effect.

"In *Amis* v. *Smith*, 16 Pet. 312, 313, this court has laid down what 'process' is, and what 'modes of proceeding' are, as those terms are used in the act of 1828.

"It is there said that 'final process' means all the writs of execution then in use, and 'modes of proceeding' are the exercise of all the duties of the ministerial officers of the States prescribed by the laws of the States for the purpose of obtaining the fruits of judgments. See also *United States Bank* v. *Halsted*, 10 Wheat, 61—63.

"Now a lien is certainly not a writ or precept of any kind. It is no part of the action of a court in a suit, nor is it the exercise of a ministerial duty of an officer of the court, nor even the result of any such exercise of duty. It is no proceeding at all, it implies no action at all; and the whole process of a suit may go on now, as it did formerly, from the original writ to the satisfaction of the judgment by a sale under execution, without any lien whatever. It is a mere dormant, extrinsic quality, attached to the judgment, not by the court, nor in the Federal Courts by the power creating those courts, but by another power, taking effect not on the judgment itself, but upon property, qualifying that property, and restraining its alienation.

"But it may be said that the Circuit Court, in compliance with the law of 1828, did, in 1837, make a rule that the lien of judgments and decrees shall continue as now provided by law, and that the Mississippi act of 1841, now in controversy, has not been adopted.

"To this we answer, that if the lien of a judgment is a regulation of property, and not a 'process' or 'mode of proceeding,'

then this rule of court can have no effect whatever. It was beyond the power of the court." (7 How. pp. 761, 762, 763.)

The court seems carefully to have avoided deciding the question. They say—p. 766—"The point certified does not require us to consider whether the law can operate on judgment liens entered *subsequent to its date*."

(2.) The authorities upon which I rely, are:

(a.) 11 How. U. S. 411. *Clements* v. *Berry*.

The court say:

"We admit that the lien of the judgment and execution in the federal courts arises under the State laws, and that the lien may be considered *as a rule of property* and *a rule of decision* under the 34th section of the Judiciary Act of 1789. But the preparatory steps by which the judgment is obtained and the lien established, depend upon the practice of the court, and that practice is settled by the federal courts and not by the courts of the State."

It is here settled that the judgment being once obtained, according to the practice of the court, the lien attaches as *a rule of property*, and becomes a rule of decision in the federal courts under the 34th section of the Judiciary Act.

(b) Wall, Jr.'s Rep. 96. *Lombard* v. *Bayard*.

"Grier, J. In the conclusion to which the court comes as to the extent of the lien, we assume the following points, without attempting to fortify them by arguments or authorities:

"1st, That the lien of judgments in the courts of the United States does not result from any direct legislation of Congress on that subject.

"2d. That under the Judiciary Act of 1789, which ordains 'that the laws of the several States shall be the rules of decision at common law in the courts of the United States,' these courts have uniformly adopted the principles of State policy and jurisprudence on the subject of the lien of judgments so far as the same were applicable, treating them as rules affecting real property and its transmission, whether by descent or purchase.

"This doctrine is fully recognized, by implication in several acts of Congresstouching this subject."* *"Act of 19th May 1828, § 2, and 4th July 1840, § 4."

(d.) 4 Peters, 124. *U. S.* v. *Morrison et. al.*

This case turned upon the question whether the lien of a judgment in the District Court of the United States for Virginia, was *suspended* by the taking out of a writ of *fieri facias.*

The opinion of the court was delivered by Chief Justice Marshall. He says:

"The single question in this case is, whether the United States or certain other creditors of the defendant, John Morrison, have the prior lien on the lands of the said Morrison which have been conveyed to those creditors. * * * *

"There is no statute in Virginia which in express terms makes a judgment a lien upon the lands of the debtor. As in England the lien is the consequence of the right to take out an *elegit.* During the existence of this right the lien is universally acknowledged. Different opinions seem at different times to have been entertained of the effect on any suspension of the right. * * * *

"In the opinion of the Circuit Court, the United States could not at the date of those deeds have taken out an *elegit;* as the lien is the mere consequence of the right to take out an *elegit,* that court was of opinion that it did not overreach a conveyance made when this right was suspended.

"*A case was soon after decided in the court of appeals, in which the question on the execution law of the State was elaborately argued and deliberately decided. This decision is, that the right to take out an* elegit *is not suspended by sueing out a writ of* fieri facias, *and consequently that the lien of the judgment continues pending the proceedings on that writ.* This court, according to its uniform course, adopts that construction of the act which is made by the highest court of the State. The decree is therefore to be reversed and annulled, and the cause remanded to the Circuit Court, that its decree may be reformed as is required by this opinion."

This is a very important case in its bearings upon the case under consideration. It will be observed that it settles the principle that the courts of the United States will hold their judgments and decrees to be liens upon real estate, in any State, or otherwise; just as the courts of such State hold their judgments and decrees to be such liens or not. This must be because such liens are regarded as "rules of property," and to be followed and enforced in regard to judgments and decrees in the courts of the United States, under the 34th section of the Judiciary Act of 1789.

"This section is unquestionably *prospective* as well as *retrospective*. It regards future as well as existing laws."

10 Wheat. 48. *Wayman* v. *Southard.*

The process acts refer to the processes used in the State courts at the dates of those acts respectively, and are not prospective.

Ibid. 57. *Bk. U. S.* v. *Halstead.*

9 Peters, 329. *Beers* v. *Haughton.*

2 How. 615. *McCracken* v. *Hayward.*

13 Pet. 45. *Ross et al.* v. *Duval et al.*

"The act of the Legislature of Virginia, in 1792, to regulate proceedings on judgments, is substantially and technically a limitation on judgments, and is not, therefore, an act to regulate process. It is a limitation law, and is a rule of property, and under the 34th section of the Judiciary Act, is a rule of decisions for the Courts of the United States. The act of the Legislature of Virginia of 1792, limits actions and executions on judgments rendered in the State courts, and the same rule must be applicable to judgments obtained in the courts of the United States." (Syllabus.)

There is no evidence on the record that the Circuit Court of Virginia ever adopted any rule, which, by a fair construction, could regulate executions. In this view, then, the case must stand upon the execution law of Virginia in 1789, adopted by the process acts. And under the decision in the above case of *Wayman* v. *Southard*, it is clear that no subsequent changes in

the process law of the State of Virginia, can be obligatory on the Circuit Court.

"And here the question arises, whether the Virginia Act of 1792 having been passed subsequent to 1789, can have any effect in the present case. So far as this act can be held to regulate executions, it is clearly inapplicable under the present acts of 1783 and 1792, to the Circuit Court.

"But the act is substantially and technically a limitation on judgments. It is not, therefore, an act to regulate process. Executions are named in the act and are authorized to be issued under certain circumstances, within a limited time; but this is only another mode of limiting the judgment, and is strictly and technically as much a limitation on the judgment as is imposed in the first part of the same section in reference to a *scire facias* or action of debt. The act provides, that after the lapse of ten years from the rendition of a judgment, when no execution has been issued, neither an action of debt nor a *scire facias* shall be brought on it. And that when an execution has been issued and not returned, other executions and proceedings may be had with. in the ten years, but not afterwards.

"If this, then, be a limitation law, it is a rule of property; and under the 34th section of the Judiciary Act, it is a rule of decision for the Courts of the United States.

"As an act of limitation, it is impossible to distinguish this from other acts which limit the time of bringing certain actions either by a designation of the grounds or the form of action."

Ibid. 60.

(e.) Bald. 246. *Thompson* v. *Phillips.*

"The State law of 1798, limiting the lien of judgments, is a *law of property and title* applicable to judgments in this court of record before its passage. * * *

"As a general principle, an elder judgment is entitled to prior satisfaction. A sale under a younger judgment does not affect the prior one, or prevent a sale under it so as to pass the title, and if the question was open, this court would give such construction to the 4th section of the State law of 1705.

"But the rule established by the Supreme Court of this State is otherwise, and will be adopted as the construction of a State law. Therefore, held:

"That a sale by a sheriff under a judgment in the Court of Common Pleas in this State, passes a title to the purchaser discharged from a prior judgment in this court, either against the defendant, as whose property it was sold, or against any persons from whom it was conveyed to the defendant." (Syllabus.)

(f.) 6 How. (Miss.) 566. *Andrews* v. *Wilkes.*

"The only remaining question, and the one on which counsel mainly rely, is whether the rule which we have laid down is the true one, where the lien accrues under the judgments of courts of different jurisdictions, one of these judgments being in the District Court of the United States, and the other in a Circuit Court of the State. It will scarcely be expected that we should undertake to prove that the same law, in all things except on points of practice, prevails in both courts; this would be supererogation. The United States, as a government, has no municipal law, except the constitution and acts of Congress. Even the Supreme Court of the United States bases its decisions on the laws of the State from which the case was taken. The same law, then, operating in both courts, how can there be a difference in the character of the lien? We are at a loss to perceive any ground for the distinction taken. It is evident that a judgment in the United States Court is as much a lien as the judgment of a State Court; and the judgments in that court being matters of record, which parties are as much bound to notice as they are judgments of the State Courts, it would follow that a purchaser at sheriff's sale under a younger judgment, would be a purchaser with notice of the older judgment in the United States Court. But it is said that a conflict of jurisdiction might be the consequence of allowing a re-sale of property which had previously been sold by authority from either of the courts. But this cannot be. It is the most effectual way to prevent a conflict of jurisdictions. We admit the lien created by their judgments;

they must admit the lien created by ours, because under our law both liens originate, and the effective operation of the lien being admitted, no difficulty can ever arise in settling the rights of parties, unless, indeed, the judgments should have been rendered so nearly at the same time as to make it difficult to ascertain which was the oldest. And the same difficulty might occur as between our State Courts; but this cannot be said to be a conflict of jurisdiction."

(g.) 2 Humph. 581, 582, 583.* *Read* v. *House et al.*

"But it is an axiom of the *jus gentium*, as fundamental as it is familiar, that to prescribe the rules for the transfer of real property, by the act of the owner, or by the operation of law, falls peculiarly and exclusively within the competency of the local government.

"The lien of a judgment is one of the rules of such transfer by operation of law. It is a step toward, it is the inception of, such transfer. It is a law of title; it is a rule of property; Congress have not, nor do they claim any power whatever over the subject. * * * *

"The case of *Ross* v. *Duval*, 13 Peters, 45, arose upon an act of Virginia, passed in 1792, providing that 'judgment within any court of record within the commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt, brought thereon, within ten years next after the date of such judgment, and not after.' It was held by the Circuit Court of the United States for the district of Virginia, not to be obligatory upon that court.

"But the Supreme Court of the United States say, the act in question is substantially a limitation on judgments. It is not therefore an act to regulate process. If this, then, say they, be a limitation law, it is a rule of property, and under the 34th section of the Judiciary Act, it is a rule of decision for the courts of the United States."

"The case of *Thompson* v. *Phillips*, before Justice Baldwin, arose on a statute of Pennsylvania, which limits the lien of a

judgment of five years, unless revived by *scire facias*. The court says: 'The terms of this law extend to all judgments, in any court of record within this State, which are broad enough to take in those of this court. Its object is declared to be 'to prevent the risk and inconveniences to purchasers of real estate, by suffering judgments to remain a lien for an indefinate length of time, without any process to continue or revive the same,' which apply in what ever court such judgments are rendered. We cannot consider it as a mere process act; it is a part of a great system of jurisprudence, for the safety and protection of purchasers,' etc., and the court in that case gave effect to that act. See Bald. Rep. vol. 1, page 274, etc."

(h.) See also upon this subject:

1 Pet. 655. *Ross* v. *Barland et al.*

5 Pet. 358. *Tayloe* v. *Thompson.*

1 Howard, 321. *Bronson* v. *Kinzie.*

2 Howard, 608. *McCracken* v. *Hayward.*

4 Wash. C. C. R. 355. *Meyer* v. *Folkrod.*

(3.) The courts of the United States adopt and carry out the local law of real property. They also adopt and carry out the local law as established in the States respectively in all cases where the rights of persons and of things are concerned and no act of Congress interferes.

12 Wheat. 153, *Jackson* v. *St. John;* 2 Wheat. 325, *Ship* v. *Miller's Heirs;* 2 Peters, 58, *Gardner* v. *Collins et al.;* 5 Peters, 151, *Henderson et ux.* v. *Griffin;* 6 Wheat. 119, *Thacher* v. *Powell;* 10 Wheat. 153, *Elmendorf* v. *Taylor;* 5 Cranch, 32, *McKean* v. *Delancy;* 4 Peters, 124, *U. S.* v. *Morrison;* 9 Cranch, 87, *Polk* v. *Wendell;* 6 Peters, 291, *Green* v. *Neal;* 11 Wheat. 367, *Shelby* v. *Gay;* 16 Peters, 26, *Watkins* v. *Holman;* 3 Pet. 276, *McCluny* v. *Silliman.*

(4.) It has been shown that the lien of judgments and decrees "*is a rule of property.*" I have also shown that it has been a *rule of property in Ohio* from the earliest period in the history

of her jurisprudence down the present time, *that judgments and decrees rendered by her courts of record in the ordinary exercise of their jurisdiction, bind real estate by lien; and that such real estate is liable to be sold under execution, to satisfy them.* This lien in Ohio is given by statute, and does not arise from the right to issue execution against lands and tenements.

(5.) Being a right of property, it cannot be effected by a rule of court. Such a rule can neither give nor take it away. Under the acts of 1792, 1828, and 1842, the power of the courts, in respect of their rules, is limited to matters of process and practice. It does not extend to *rights of property* nor *rules of decision.* They are beyond its reach.

(6.) There is nothing in the fact that the District Court has exclusive admiralty jurisdiction in certain cases. (In this case it has been shown that the jurisdiction was concurrent.) It has exclusive "original cognizance" * * * * * "of all suits for penalties and forfeitures incurred under the laws of the United States." It has, also, "jurisdiction exclusively of the courts of the several States, of all suits against consuls and vice consuls except," etc. (Act of 24th Sept. 1789, § 9. 1 Pet. Stat. 76; Bright. 231.)

Who doubts that a judgment or decree for the payment of money, in either of those cases in Ohio, would be a lien upon real estate?

Why should "a decree in admiralty" be the only exception to the rule?

So the Circuit Court of the United States has jurisdiction exclusive of the State courts, in copy-right and patent-right cases under the laws of the United States. (Act of Feb. 15, 1819 1. 3 Pet. Stat. 481. Act of July 4, 1836, § 16 and 17. Pet. Stat 123. Bright. pp. 732–733. 3 Comst. 9, *Dudley* v. *Mayhew.*)

Can it be doubted that judgments and decrees of the Circuit Court, in these cases for the payment of money, would be as

much liens upon real estate as judgments and decrees in cases where the State courts have concurrent jurisdiction?

Why, I ask again, are decrees in admiralty to be the *only exception?* Am I not well warranted in saying that it rests on no solid foundation of reason or principle?

(7.) It was said by the defendants' counsel in the argument in the court below, that a judgment for $300 recovered before a justice of the peace, is not a lien upon real estate; while a judgment in the common pleas for the same amount, is a lien. The parallelism between those cases and a judgment at law and a decree in admiralty for the same cause of action, was insisted upon.

(a.) A justice's court is not a court of record.

(b.) A justice's judgment is not a lien *in any case.*

(c.) The policy of our law is to concentrate the evidences of incumbrances upon real estate at the county-seat.

(d.) The plaintiff can make his judgment before a justice a lien by filing a transcript in the clerk's office.

(8.) It has been seen that I claim that decrees in admiralty *are liens under the acts of Congress referred to.*

(a.) I claim that they are clearly within the "equity" of those acts, whether within their letter or not.

Sedg. S. & C. L. 296, and the cases cited.

The New York statute relative to *creditors' bills is in terms* confined to *judgment creditors.* It has been held that *decree creditors* and *assignees of judgments* are by "Equity" and analogy within the statute. The chancellor said it was "the duty of the court to extend the remedy to every case, coming clearly within the spirit and intent of the statutory provision."

7 Paige C. R. 123, *Gleason* v. *Gage;* 3 Ibid. 321, *De Peyson et al.* v. *Clarkson et al.;* 2 Barb. Ch. Pr. 148.

3 Ohio S. R. 85 *Slater* v. *Cave.*

In the case last cited the court adopts the language of Mr. Justice Burnet, in 1 Ohio Rep. 221. "The intention of the

law-makers may be collected from the cause, or necessity of the act; and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter" (4 Bac. title Statute, I. S. 38, 45, 50.) Again, he says, on page 222: "Every statute should be construed with reference to its *object*, and the will of the law-makers is best promoted by such a construction as secures *that object*, and excludes every other."

(b.) The territorial law of 1795, made real estate liable to execution, but was silent as to lien of judgments. In *Roads* v. *Symmes*, 1 O. R. 312, the Supreme Court of Ohio held that under that law such lien existed, and that it was co-extensive with the territorial jurisdiction of the court. (See ante, p. 16.)

(9.) The case of *Olin* v. *Hungerford*, 10 Ohio Rep. 268, was relied upon.

In that case the court held that where there was a decree of divorce and a decree for alimony, payable in annual installments, the latter was not a lien upon the real estate of the defendant.

(a.) There was nothing due or to be paid when the decree was entered.

(b.) The court say the statute which authorized the proceedings was a special one and made no provision as to how the alimony should be collected, if coercion should become necessary.

(c.) Unlike the statutes as to judgments and decrees, it was silent as to a lien or the issuing of an execution.

(d.) Upon principle and authority it would be hard to maintain that this decree was not a lien after each default, and the right to issue an execution had accrued. See the authorities hereinbefore referred to upon the subject.

(10.) The English court of admiralty, it has been shown, is

not a court of record. It has no jurisdiction but in admiralty. There all revenue cases belong to the Court of Exchequer. Their law of real property and their policy in regard to it are different from ours. The reasons of the rule exempting real property there, have long ceased to exist here. The rule also should be held to have ceased.

(11.) It is perhaps immaterial to the result of this argument whether the lien of judgments and decrees in the courts of the United States be held to arise under the 34th section of the Judiciary act, or under the process acts. In either case the rule has the same ultimate origin. It arises from the adoption of the State laws upon the subject. In this connection I invite attention to,

1 Peters 604. *Fullerton et al.* v. *The Bank U. S.*

In this case the Supreme Court held:

(a.) That the courts of the United States can *silently* and practically, without a written rule, adopt the State process laws and practice.

(b.) That when the District Court of the United States was established in Ohio in 1803, this was done.

(c.) That when the 7th circuit was established in 1807, the circuit judge found the State practice of Ohio already "adopted in fact into the Circuit Court," and that it had since been pursued "by a uniform understanding without any positive rule upon the subject."

(d.) That the act of the Legislature of Ohio, of Feb. 18th, 1820 relative to proceedings against parties to promissory notes, was a wise law, and was at once adopted into the practice of the Circuit Court.

If the subject had been before them, the court would doubtless have held further, in express terms, as they clearly did in effect, that the law of Ohio passed in 1810, giving to decrees in equity the same force and effect in all respects as judgments at law, and the earlier law of 1804 (1 Chase 434), authorizing

execution to issue upon such decrees against lands and tenements, when directed by the court, were also at once adopted into the practice of the Circuit Court without any formal rule. If I am in error as to the lien of judgments and decrees being "*a rule of property*," then the lien of decrees in equity in the Circuit Court of the United States in Ohio must have originally rested upon this basis; unless prior to the passage of these laws, they were held to be liens, as they well might be, from their analogy to judgments at law. Prior to the act of 1828, I understand they were universally recognized as having the same lien as judgments at law.

The principle was thus settled that judgments and decrees in the courts of the United States in Ohio were liens upon real estate. The foundation of the judgment or decree, whether for one cause of action or another, and whether that cause arise on land or water, is immaterial. The acts of 1828 and 1840, I have endeavored to show, *merely affirmed and continued* this state of things. If they did not, it is confidently claimed that they *establish* the lien contended for.

See also 2 O. S. Res. 36. *Corwin et al.* v. *Benham.*

(12.) 4 McLean, 612. *U. S.* v. *Duncan.* (12 Illinois Rep. 523 S. C)

This is a decision of the Circuit Court of the United States for the district of Illinois, made at December term, 1850. It was held that a decree in equity for the payment of money rendered by that court "at June term, 1846," was a lien upon real estate.

The court do not give the reasoning by which they were conducted to this conclusion. In a note, evidently written by the judge who delivered the opinion of the court, it is said: "The opinion of the profession in Illinios is so general in favor of the doctrine that the lien of judgments of the United States court is co-extensive with its jurisdiction, as stated in the text, it was not controverted in the argument."

I apprehend it will be difficult to find any distinction in

principle as regards the question here under consideration, between a decree in chancery and a decree in admiralty.

(13.) 2 Blatchf. 341. *Cropsey* v. *Crandall.*

"A judgment or decree docketed in a court of the United States for the Southern District of New York, *is a lien on the lands of the defendant* in what ever county of the district they are situated.

"It is not necessary to the creation of such liens that a transcript of the judgment or decree should be filed in the office of the clerk of any county in the district.

"The statutes of New York which limit the duration of the lien of the judgments and decrees of the State courts apply to the judgments and decrees of the courts of the United States within the State." (Syllabus.)

This is a case decided by the Circuit Court of the United States for the Southern District of New York. *It related to a decree in admiralty. It is exactly in point in this case.*

In New York, as in Ohio, a decree in chancery for the payment of money is made a lien upon real estate by statute. 4 Hill, 617, *Ex parte Becker.*

Judge Conkling, *in the last edition* of his work on Admiralty Law, is silent upon the question here discussed. Professor Parsons adverts to it, but expresses no opinion.

VI. ARE THESE—"DECREES IN ADMIRALTY?"

(1.) The case out of which they grew was not one of admiralty jurisdiction, as established in England at the time of the American Revolution; and it was not of that character according to the rulings of the Supreme Court of the United States, down to a recent period.

(2.) The history of the rise and conflict of this jurisdiction in England is so fully given in the elementary books, and in the adjudications of the Federal Supreme Court, that all the learning upon the subject has become trite. It would be a waste of time particularly to advert to it here.

(3.) The growth of this jurisdiction in the United States is shown in the following cases:

10 Wheat 428. *The Thomas Jefferson.*
11 Pet. 175. *Steamboat Orleans* v. *Plœbus.*
5 How. 441. *Waring* v. *Clark.*
6 How. 344. *N. J. S. N. Co.* v. *Merchants' Bank.*
10 How. 586. *Newton* v. *Stebbins.*
12 How. 443. *Genesee Chief* v. *Fitzhugh,*
3 Ohio St. Rep. 105. *Keating* v. *Spink.*

In the case last cited the subject is treated with fulnesss, clearness and great ability.

(4.) The case of *The Thomas Jefferson* was decided in 1825. It established the principle, in accordance with the English adjudications, that admiralty jurisdiction was confined to cases arising "upon the sea, or upon waters within the ebb and flow of the tide."

In that case the query was suggested: "Whether under the power to regulate commerce among the several States, Congress may not extend the remedy by the summary process of admiralty to the case of voyages on the western waters."

(5.) The act of 1845 "does not in terms confer admiralty jurisdiction; but it is an act to extend the jurisdiction of the District Courts" to certain cases "arising upon the lakes and navigable waters connecting them; which are to be proceeded in and decided in the same manner as cases arising upon the high seas and tide-waters, within the admiraity and maritime jurisdiction of the United States."

3 Ohio St. Rep. 419, *Keating* v. *Spink.*

(6.) When this act was passed it had not been held that admiralty jurisdiction could be entertained in any case not related to tide water. The authority of *The Thomas Jefferson* was unshaken. There had been a steady growth of this jurisdiction under the decisions of the Supreme Court, but "the indispensa-

ble necessity of the tide-water element" was not denied until the decision of that Court in the case of the *Genesee Chief*. That decision was made in 1851. In that case the growing breadth of this jurisdiction reached its maximum point. "The necessity of the tide-water element" was for the first time exploded. A majority of the Court held, that "if the water was navigable, it was deemed to be public, and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution." (12 How. 457.)

(7.) Under the authority of this case, it must be admitted that the original decree of the Circuit Court of the 12th of November, 1856, was a "decree of admiralty." On the other hand, it is undeniable that the case was originally one of common law, as well as of admiralty jurisdiction.

Mr. Justice Story, in his work on the Constitution, vol. iii. p. 334, n. says:

"The States could have no right to create Courts of Admiralty as such, or to confer on their own Courts the cognizance of such cases were *exclusively* cognizable in Admiralty Courts, but the States might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent. *This latter class of cases can no more be deemed cases of admiralty and martime jurisdiction than cases of common law jurisdiction.*"

It cannot be questioned that if a *judgment* had been recovered in the Circuit Court it would have been a lien upon real estate. Why, I ask again, is not a decree in the same court, between the same parties, and for the same cause of action, also a lien? Is not the argument which concedes the one and denies the other, to say the least, fallacious?

(8.) The entry of the 7th of July, 1859, stands upon a different footing from the original decree. It sets forth the affirmance of that decree by the Supreme Court of the United States, but it contains more. *It is a judgment by confession or consent* against the original respondents, and also against their surities in the appeal. (See the agreement of the parties made part of the complainant's bill.)

(9.) The first section of the act of Congress, of March 3, 1847, (9 Stat. 181, Bright. Dig. 26,) provides that where process *in rem* shall be issued, the marshal may stay its execution or release the property, if seized, upon receiving a bond or stipulation, with sufficient sureties, conditioned that the claimant "will abide and answer the decree of the court," and "such bond or stipulations shall be returned to the said court, *and judgment on the same against both the principals and surities* may be recovered at the time of rendering the decree in the original cause'.'

Upon the coming in of the answer some further questions kindred to those which have been discussed may arise. It is deemed unnecessary to anticipate them.

VII. IN ANY EVENT THE DEMURRER MUST BE OVER-RULED.

(1.) The bill avers that the judgment debtors have no goods or chattels liable to execution, and no real estate, except the lands described in the bill.

(2.) If it shall be held that there is no lien, and that the levy of the execution was a nullity, still the complainants are entitled to the aid of this court in reaching the real estate of the defendants to satisfy their decree.

20 J. R. 554, *Hadden* v. *Spader;* 4 J. C. Rep. 450, *Bayard* v. *Hoffman;* Ibid. 690, *McDermit* v. *Strong*; 7 Paige C. R. 123, *Gleason* v. *Gage;* 1 Ibid. 641, *Edmeston* v. *Lyde* ; 6 Ibid. 254, *Speiglemeyer* v. *Crawford;* 2 Atkins, 600, *Taylor* v. *Jones;* 3 Ibid. 352, *Edgehill* v. *Hayward et al.;* 8 East, 485, *Scott* v. *Scholly*; Amb. 596, *Patridge* v. *Gop;* 2 Brok. 384, *U. S.* v. *Graves et al.*

"We have no privileged species of property, any more than a privileged order of men. The principle of our law, as well as its policy to subject all the property of a debtor to the payment of his debts." (Griffin arguendo in *Hadden* v. *Spader*, cited above.)

"A creditor by decree in Chancery is entitled to the same re-

lief upon a creditor's bill, as a creditor by judgment at law."

6 Paige C. R. 254, *Speiglemeyer* v. *Crawford.*

3 Ibid. 320. *Clarkson* v. *Depeyster.*

"The principle being established that every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of the court are perfectly adequate to carry that principle into full effect."

1 Paige C. R. 641. *Edmeston* v. *Lyde.*

"The debts, choses in action, and other equitable rights of the defendants may be assigned or sold under the decree of this court so as to vest an equitable interest in the purchaser, which will be protected both here and at law."

Ibid.

"This is a bill for discovery, in aid of the execution at law, as well as for relief against property which cannot be levied on by execution. For that reason the complainant is entitled to a discovery of all the property, both real and personal, which the defendant now owns, either in the city of New York, or elsewhere. If it is within this State, it may hereafter be reached by an execution out of this Court; and if elsewhere, the defendant may be compelled by an order of the Court to transfer it, by a proper conveyance, to a receiver, to be sold and applied to the payment of the complainant's debt."

3 Ibid. 236. *LeRoy* v. *Rogers.*

The object of the New York statute in regard to creditors' bills was not to introduce any new rule of law, "but it was to establish and declare the great principle decided by the Court for the correction of errors, in *Hadden* v. *Spader*, that the creditor, after the remedy against the tangible property of the debtor had been exhausted by the return of an execution unsatisfied, might come into this Court for the purpose of obtaining a discovery and payment out of the property of the debtor which could not otherwise be reached."

7 Ibid. 123. *Gleason* v. *Gage.*

See also 2 O. Rep. 294, *Gilmore* v. *Miami Ex. Co. et al.;* 3

Ibid., 502; S. C. 6 Ibid., 103, 112, *Grosvenor &* v. *Auxtin's Adm'r;* 6 Ibid., 227, 233, *Piatt* v. *St. Clair's Heirs et al.;* 8 Ibid., 62, 70, *Gilmore's Ex'rs* v. *Bank of Cincinnati et al.;* 10 Ibid., 476, *Seymour* v. *Mil. & Chil. Turnpike Co.;* 11 O. Rep. 273, *Miers et al.* v. *Z. & M. Turnpike Co.;* 11 Ibid., 292, *Cadwalader* v. *Granville Alex. Soc. et al.;* 16 O. Rep. 449, *Myers et al.* v. *Hewet et al.;* 17 Ibid., 336, *Mattox et al.* v. *Humphrey's Admr et al.*

"It is also true that if a claim is to be satisfied out of a fund which is accessible only by the aid of a Court of Chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."

7 Cranch, 89; *Russell* v. *Clark's Ex'rs.*

"Where the debtor resides or has removed out of the Commonwealth, so that no judgment can be had against him, in all such cases resort may be had to Chancery in the first instance.

1 Littel, 302, *Scott* v. *McMillan;* 5 I. I. Marshal, 69, *Anderson et al.* v. *Bradford.* See also 2 Blf., 129, *Sweney et al.* v. *Ferguson et al.;* Ibid., 421, *O'Brien et al.* v. *Coulter et al.;* 4 I. C. R., 671, *Erinkerhoof* v. *Brown.*

It is presumed the defendant's counsel will not deny that real estate can be reached *in some form of procedure* to satisfy a decree in admiralty for the payment of money.

(3.) It is the policy of all wise systems of jurisprudence to avoid as far as possible, circuity of action and unnecessary litigation.

It must be admitted that a strange state of law exists, if, after having procured a decree in admiralty, it shall be necessary for the libellants to procure *another decree—in equity*—to sell real estate to satisfy it, instead of issuing an execution upon the first decree, against the goods, chattels, lands and tenements of the defendants, as is constantly done upon decrees in equity in both the State and Federal Courts of Ohio.

Supreme Court of the United States,

DECEMBER TERM, 1862.

EBER B. WARD, ET. AL.

VS.

PHILO CHAMBERLIN, ET. AL.

IN CHANCERY. ON DEMURRER.

CERTIFIED, ON DIVISION OF OPINION, FROM U. S. CIRCUIT COURT FOR NORTHERN DISTRICT OF OHIO, JULY TERM, 1860.

R. P. SPALDING, SOLICITOR FOR DEF'TS.

EBER B. WARD et al.
vs.
PHILO CHAMBERLIN et al.

CHANCERY,

Demurrer.

STATEMENT.

The complainants, on the 12th November, 1856, on an appeal from the U. S. District Court, obtained a decree against the defendants, Chamberlin & Crawford, in the Circuit Court of the United States for the Southern District of Ohio, in a suit in Admiralty for damages sustained by libellants in a collision on the waters of Lake Erie, between the steamer Atlantic, belonging to the libellants, and the propeller Ogdensburgh, belonging to said Chamberlin & Crawford.

This decree was affirmed, on appeal to the Supreme Court, at December Term, 1858, see 21 Howard, 548.

In 1860, a *fi. fa. et lev. fa.*, issued from the U. S. Court for said Southern District of Ohio, and was levied upon lands, in the Northern District, once the property of said Philo Chamberlin, but at the time of the levy, they had long been conveyed to *bona fide* purchasers. The Bill in Chancery was filed in this case to subject said lands to sale on execution under said levy. The defendants demur, taking the ground that upon a decree for the payment of money, in Admiralty, an execution will not issue against lands.

PROPOSITIONS AND AUTHORITIES BY DEFENDANTS.

Proposition 1st.—It is not in accordance with long established usage in Courts of Admiralty, to issue execution against lands.—1 Comeyn's Digest, Title Admiralty E. 18, p. 393; 1 Coventry & Hughes' Eng. Dig. 39. Clerk's Praxis, 137–139; Hall's Adm. Practice, 112–113; 2 Brown's Civil & Adm. Law, 410, 412; Greenway *vs.* Barker, Godbolt's Rep. 261.

Proposition 2d,—Decrees in Admiralty for the payment of money, were enforced in the U. S. Courts from 1845 until 1862, by the following instrumentalities:

"RULE 21, In all cases where the decree is for the pay-
" ment of money, the libellant may, at his election, have an
" attachment to compel the defendant to perform the decree,
" or a writ of execution in the nature of a *capias* and of a *fieri*
" *facias*, commanding the marshal or his deputy to levy the
" amount thereof of the goods and chattels of the defendant,
" and for want thereof, to arrest his body to answer the exi-
" gency of the execution. In all other cases, the decree may
" be enforced by an attachment to compel the defendant to
" perform the decree; and upon such attachment the defend-
" ant may be arrested and committed to prison until he per-
" forms the decree, or is otherwise discharged by law, or by
" order of the court."

This rule was made by the Supreme Court in 1845, in pursuance of an Act of Congress approved August 23, 1842, (5 U. S. Statutes at Large 516,) empowering the said court to prescribe and regulate writs and other process to be used in the District and Circuit Courts of the United States, and generally, *to regulate the whole practice of the said Courts;* and, until abrogated at December Term, 1861, (1 Black's Rep. 6,) stood as the rule of practice of the District Court for the execution of decrees for the payment of money, as imperative and inflexible as the act itself.

The rule authorizes Courts of Admiralty to issue writs of *fieri facias* to be levied on "goods and chattels," but no authority is given to issue writs of *levari facias* to be levied on lands. The argument that "*expressio unius, exclusio alterius*," could never be more fitly used than in this instance.

Judge CONKLING, in the first edition of his treatise upon Admiralty Jurisdiction and Practice, vol ii., p. 775, in commenting upon the 21st rule, says: "The reasonable conclusion
" would seem to be, that the *lands* of the defendant and his
" sureties are not henceforth to be considered subject to the

" admiralty process of execution, except so far as they may be " indirectly reached through the coercive power of personal " restraint."

In his edition of the same work published in 1857, vol. ii., p. 117, the learned author says: "The 21st rule of the Rules " of Admiralty Practice, which prescribes the form of final " process, directs that the writ of execution in the nature of " *fieri facias*, shall command the marshal or his deputy to " levy the amount thereof of the 'goods and chattels' of the " defendant, and *is silent as to lands*. The omission was, " doubtless, intentional, and should be interpreted as *an im-* " *plied prohibition of an admiralty execution against* " *lands*."

In the case of "The Steamboat Delaware," Olcott's Rep. 240, Judge BETTS appears to take the same view of this rule in admiralty, for in giving his opinion, he says: "According to " the practice of this court, a decree against stipulators for " breach of their undertaking, is equivalent to a judgment for the " amount of the stipulation. This is substantially the course " of the English Admiralty, *other than that lands cannot, in* " *that manner, be made subject to admiralty process*.—2 " Browne's Civ. & Adm. Law, 98. Under the rules of the " District Court, the stipulation includes *a consent* that execu- " tion may issue against *all the estate* of the stipulators; and " the order or decree, upon default in observing the engage- " ment, is correspondent with it. The remedy is now made " positive and certain. *Without the consent of the stipula-* " *tors*, in respect to libellants, on all decrees for the payment " of money, *by the rule of the Supreme Court* so far as re- " spects *goods and chattels*, and is also extended to the arrest " of the person, in case goods and chattels are not found to " satisfy the decree.

" Either, then, the claimant might proceed upon *the consent*, " and take out execution against chattels and *lands* of the " stipulators, or he is entitled, by the rules of the Supreme " Court, absolutely to an attachment."

Proposition 3d.—This construction of the 21st Rule in Admiralty, is not only consistent with long established usage in the Maritime Courts of Great Britain, but is in accordance with the analogies springing from the whole series of Congressional enactments upon the subject of PROCESS.

1. The process act of 1789, 1 U. S. Statutes at Large 93; provides that "writs and executions" in causes of Equity and Admiralty and Maritime jurisdiction, shall be according to the course of the civil law.

2. The process act of 1792, 1st U. S. Statutes at Large 275; provides that the forms of writs, executions and other process in Courts of Equity, and Courts of Admiralty and Maritime jurisdiction, shall be according to the principles, rules and usages which belong to Courts of Equity and to Courts of Admiralty, respectively, *as contra distinguished from Courts of common law.*

3. The process act of 1828, 4 U. S. Statutes at Large 278; provides that proceeding in suits in Courts of Admiralty and Maritime jurisdiction shall be according to the principles, rules and usages which belong to Courts of Admiralty *as contra distinguished from Courts of common law.* The 3d section of this act of 1828 was clearly not intended to embrace the execution of Admiralty decrees. The provision for the execution of decrees in equity, in those States having no Courts of Equity, and the absence of any special provision for the execution of decrees in Admiralty, when it was known that no State could have Courts of Admiralty, tend very strongly to show that the decrees there spoken of, were decrees in Equity; and that the execution of Admiralty decrees was intended to be left to the second section of the act of 1792, (1, Statutes at Large 276,) to wit: that executions in Courts of Admiralty should be according to the rules and usages which belong to Courts of Admiralty, as contra distinguished from Courts of common law.

"The *instance court*, which takes cognizance of injuries committed on the high seas, is governed, says Doctor BROWNE,

'by the civil law, the laws of Oleron, and the customs of the 'Admiralty, modified by statute law.'"—2 Browne's Civil and Adm. Law, 29.

Proposition 4th.—No case can be found where an Admiralty execution has been levied on lands in England, and no case of the kind will be found in the United States except in those judicial districts in which stipulators have expressly consented that execution shall issue against their lands: and in these excepted cases, it is humbly submitted that the practice was wholly irregular under the operation of the 21st rule.—Dunlap's Adm. Practice, 138; 2, Conkling's Adm. Jur. and Prac., last edition, p. 117; Olcott's Rep. 240.

Proposition 5th.—It is earnestly insisted by the learned solicitor for complainants (see printed brief, p. 41) that the case in which the decree was rendered, was originally one of Common Law as well as Admiralty Jurisdiction, and that a judgment recovered at law, would have been a lien upon real estate. This is conceded for all reasonable purposes. But the history of the case shows that the complainants were found, both by the Circuit Court and the Supreme Court, "*to be in fault;*" and, consequently, no judgment could have been obtained at law.—21 Howard, 548.

The complainants are content to take the benefit of an "apportionment of damages," which they can only have by the peculiar structure of the Admiralty Law, while they complain bitterly of that other peculiarity of the same law, which refuses to subject lands to the satisfaction of its decree for the payment of money.

If they had proceeded at law, they would have charged neither "lands" nor "goods" in execution. They proceeded in admiralty, and, in that court, are permitted, though in fault themselves, to charge the "goods" of defendants.

Chancellor KENT says: "Nothing can be more unlike, *in* "*its process*, pleadings, proofs, trial and *remedy*, than the "practice of the Courts of Admiralty and of the Courts of "Common Law."—1 Kent's Com., New Edit., 380.

As the complainants selected the *forum*, they should not be at liberty to abjure its remedial justice.

Proposition 6th.—The principles of the Common Law are inapplicable to *process* and *pleadings* in Courts of Admiralty. Clarke *vs.* New Jersey Steam Nav. Co., 1 Story 531; Manro *vs.* Almeider, 10 Wheaton 473; Laws U. S. Courts, 8; 5 Howard 460.

JUDGE CURTIS' OPINION.

My opinion has been requested upon the question whether, upon a decree *in personam*, in the District Court of the United States for the District of Ohio, (there being no rule of that Court on the subject,) an execution may issue, commanding a levy *on the lands* of the respondent.

The process Act of May 19, 1828, sec. 3, (4 Statutes at Large 281,) provides that writs of execution upon *decrees*, rendered in any of the Courts of the United States, shall be the same in substance in each State as those then used in such State, saving to the Courts in those States where there are not Courts of Equity, the power to prescribe the mode of executing their decrees in equity.

By the Act of August 23d, 1842, sec. 6, (5 Statutes at Large 518,) the Supreme Court is empowered to regulate "the whole practice" of the District and Circuit Courts.

By the XXI Admiralty Rule, the Supreme Court has regulated the practice of the District Courts, as respects the execution of decrees for the payment of money; and have empowered those Courts to issue writs of *fieri facias*, to be levied on the goods and chattels of the defendant; but no authority is given to issue writs of *levari facias*, to be levied on lands.

The argument that *expressio unius, exclusio alterius*, seems to me, in this case, to be irresistible. For how can this rule be said to regulate the practice of the District Courts, if the libellant, instead of proceeding to execute the decree in the mode prescribed by the rule, may proceed in a totally different manner.

In my opinion this rule was designed as a substitute for the authority contained in the third section of the Act of 1828, if that extends to Admiralty decrees, and not as a supplement thereto; and consequently the present power of District Courts to execute their Admiralty decrees is found in this rule, and nowhere else.